# TRANSCRIPT OF RECORD

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 317

DAY-BRITE LIGHTING, INC., APPELLANT,

V3.

STATE OF MISSOURI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

FILED SEPTEMBER 12, 1951,

PROBABLE JURISDICTION WOTED NOVEMBER 5, 1981.

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# IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1951.

STATE OF MISSOURI, Appellee,

VS.

THE DAY-BRITE LIGHTING, INC., Appellant

PRAECIPE FOR TRANSCRIPT-Filed August 14, 1951

To the Honorable the Clerk of the Supreme Court of Missouri:

In compliance with Rule 10 of the Rules of the Supreme Court of the United States, you are hereby requested properly to certify the following matters and things of record in the above entitled cause for filing with the Clerk of the Supreme Court of the United States, upon appeal taken from the Supreme Court of Missouri, to said Court:

1. This Praecipe.

2. The Transcript of Record of the proceedings in the lower court, filed in the Supreme Court.

3. Argument and submission of above entitled cause to

Division 1 of the Supreme Court of Missouri.

4. The decision and judgment of Division 1 of the Supreme Court of Missouri, affirming the judgment of the lower court, with opinion filed.

(Note: The opinion of Division 1 of the Supreme Court of Missouri was adopted as the opinion later delivered by the Supreme Court en banc on the 12th day of June, 1951. It is therefore, suggested that it is unnecessary to certify both opinions, it being sufficient that the opinion en banc is certified. We suggest the following entry:

[fol. 1a] "The opinion by Division 1 of the Supreme Court of Missouri was adopted by the Supreme Court en banc as its opinion on June 12, 1951, a copy of which opinion is hereinafter certified.") 5. Filing of motion for rehearing in Division 1 and also filing of motion to transfer said cause to the Court en banc.

6. Action of the Court in overruling the motion for a rehearing and in sustaining the motion to transfer the cause to the court en banc.

7. Argument and submission of the cause to the Supreme

Court en banc.

8. Judgment and decision by the Supreme Court en banc, a including certified copy of the opinion by that court and also including the dissenting opinions filed at the same time by Judges Vandeventer and Hyde.

9. Filing by Appellant of motion for a rehearing in the

Supreme Court en banc.

10. Action by the conta en bane in overruling said motion for a rehearing.

11. Action by the Supreme Court in sustaining Appel-

lant's motion to stay the mandate.

12. Petition for appeal to the Supreme Court of the United States, with record entry of filing.

13. Appellant's Bond on Appeal and approval by the

court, with record entry of filing:

14. Appellant's assignments of error.

15. Appellant's jurisdictional statement.

16. Appellant's general statement.

17. Citation.

18. Order allowing appeals

19. Statement of service of copies of petition for appeal, [fol. 1b] assignments of error, jurisdictional statement, general statement, citation, and order allowing appeal, upon the Appellee by the Appellant.

Louis J. Portner, 509 Olive Street, St. Louis, Missouri; Cobbs, Blake, Armstrong, Teasdale & Roos, Thomas H. Cobbs, Robert E. Blake, Henry C. M. Lamkin, by Henry C. M. Lamkin, Attorneys for Appellant.

[fol. 1e] .

[Caption omitted]

[fols, 2-3]

[Caption omitted]

[fol. 4] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

STATE OF MISSOURI, Plaintiff.

VS.

DAY BRITE LIGHTING, INC.

Charged With Violation of Section 11,785 R. S., Missouri, 1939, "Employees to Be Allowed Four Hours to Vote, Etc."

Information-June 24, 1947

Jasper R. Vettori, Associate Prosecuting Attorney, of the St. Louis Court of Criminal Correction, new here in Court, on behalf of the State of Missouri, information makes as follows:

That Day Brite Lighting, Inc., a corporation in the City of St. Louis, on the 5th day of November, 1946, being a day set aside for the holding of an election in said City and State, and being then and there the employer of Fred C. Grotemeyer, who was a person entitled to vote at said election, did wilfully and unlawfully fail and refuse to allow the said Fred C. Grotemeyer, their employee, to absent himself from his employment for a period of four hours between the times of the opening and closing of the polls, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

#### Count II

That the Day Brite Lighting, Inc., a corporation, in the City of St. Louis, on the 5th day of November, 1946, being a day set aside for the holding of an election in said City and State, and being then and there the employer of Fred C. Grotemeyer, who was a person entitled to vote at said election, and who was entitled to absent himself from his work and employment for a period of Sour hears between the times of opening and closing of the polls without penalty [fol. 5] of deduction of wages because of the exercise of

such privilege, did wilfully and unlawfully penalize the said Fred C. Grotemeyer, their employee, by deducting from his salary the amount of his eranings for the time he was absent from his work, in the exercise of such privilege, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

Jasper R. Vetteri, Associate Presecuting Attorney of the St. Louis Court of Criminal Correction.

Duly sworn to by Jasper R. Vettori. Jurat omitted in printing:

[fol. 6] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

## WARRANT

The State of Missouri to the Sheriff of the City of St. Louis. Greeting:

We Command You to take Day Brite Lighting Inc., a corporation if he be found in your bailiwick, and Said Corporation safely keep, so that you have Said Corporation's body before the St. Louis Court of Criminal Correction. forthwith, then and there to answer a complaint made against Said Corporation for violation of Section 11,785 R. S. Missouri (1939) "Employees to be allowed four hours, etc." which more fully appears by the foregoing affidavit, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State; and have you then and there this writ, with your return thereon how you executed the same.

Witness, Erwin Steecklin, Clerk of the said Court with the seal hereto affixed, at office, in the City of St. Louis, this 15th day of June in the year of our Lord nineteen hundred

and forty seven.

(Signed) Erwin Stoecklin, Clerk.

[fols. 7-8] IN THE ST. LOUIS COURT OF CRIMINAL COREECTION

## [Title omitted]

ORDER SETTING CAUSE FOR TRIAL-June 23rd, 1949

Now, on this day, the mandate and opinion of the St. Louis Court of Appeals reversing the judgment of Conviction of the defendant, under the first count of the information, and reversing the Judgment quashing and dismissing the second count of the information and remanding the cause for trial on the second count, received and filed. Cause set for trial July 11, 1949. Suppoenas to is an experience of the second count, received and filed.

[fol, 9] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

# [Title omitted]

Defendant's Motion to Quash the Information Filed July 6, 1949

'Comes now the defendant, Day-Brite Lighting, Incorporated, a corporation, by Louis J. Portner & Cobbs, Logan, Roos & Armstrong its attorneys, and moves the Court to quash Count 2 of the information filed herein, Count 2 being the only count now pending against this Defendant, and for grounds for said motion states and alleges as follows:

- 1. That the acts of this Defendant, as alleged under Count 2 in the information filed herein, do not constitute a violation of any section of the laws of the State of Missouri and in particular, Section 11785 of the Revised Statutes of Missouri for 1939.
- 2. That the facts stated under Count 2 in the information filed herein do not constitute an offense under the laws of the State of Missouri and in particular, Section 11785, Revised Statutes of Missouri 1939.
- 3. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that enforcement of the statute sought to be enforced by the information herein—namely Section 11785, R. S. Mo. 1939, will, under Count 2 of said information,

deprive this Defendant of his property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

- of A. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the State of Missouri in that the enforcement of the statute sought to be enforced by the information herein—namely Section [fol. 10] 11785, R. S. Mo. 1939, will, under Count 2 of said information, deprive this defendant of his property without due process of law in violation of Section 10 of Article 1 of the Constitution of Missouri for 1945.
- 5. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the State of Missouri in that the enforcement of the statute sought to be enforced by the information herein, namely, Section 11785 R. S. Mo. 1939, will, under Count 2 of said information constitute the taking of private property for private use in violation of Section 28 of Article I of the Constitution of Missouri for 1945.
  - 6. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that the enforcement of the statute sought to be enforced by the information herein—namely Section 11785, R. S. Mo. 1939 will, under Count 2 of said information, dany to this defendant equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.
- 7. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the State of Missouri in that the enforcement of the statute sought to be enforced by the information herein—namely Section 11785, R. S. Mo. 1939 will, under Count 2 of said information, deny to this Defendant equal protection of the laws in violation of Section 14 of Article I of the Constitution of Missouri for 1945.
- 8. That said Section 11785, R. S. Mo. 1939 is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that the enforcement of said statute under Count 2 of said information will impair the obligation of contract in violation of Section 10, Article I of the Constitution of the United States.

10. That said Section 11785, R. S. Mo. 1939 is invalid and unconstitutional under Section 28, Article IV of the Constitution of Missouri for 1945, in that the bill introduced and passed by the legislature and signed by the Governor, and the amendment to said bill likewise introduced and passed by the legislature and signed by the Governor, of which this said statute formed a part, contained more than one subject and the various subjects therein contained were not clearly expressed in the title of either said bill or said amendment thereto in that Section 11785 R. S. Mo. 1939 under which this prosecution is brought was enacted by the 39th General Assembly of the State of Missouri as House Bill No. 273 Laws of Missouri for 1897 as part of an act entitled—

"An act to amend an act entitled 'An act to prevented corrupt practice in elections, to limit the expenses of candidates, to prescribe the duties of candidates and political committees, and provide penalties and remedies for violation of this act', approved March 31, 1893, by inserting between Sections 4 and 5 three new sections to be known as Sections 4a, 4b, and 4c':

and that this said section is unconstitutional and invalid because the intent and purpose of the said Section 11785 R. S. Mo. 1939 does not indicate a purpose to enact provisions that are germane to the subject expressed in the title of the original act above set out and that the title of the original act passed at the 37th General Assembly of the State of Missouri and found in the laws of Missouri for 1893 on Page 157, or the title of the act as amended by the 39th General Assembly and found in session laws for the State of Missouri for 1897, Page 108 does not include in the title the subject of said Section 1785 R. S. Mo. 1939.

[fol. 12] 11. Section 11785, R. S. Mo. 1939, is invalid and unconstitutional in that if this defendant performs the acts necessary to avoid further and future prosecution here.

under, he will then be in violation of Section 11786, Revised Statutes of Mo. 1939, which provides, in part, that no corporation shall induce or persuade any employee to vote on any question to be determined at any election.

(S. Louis J. Portner, 509 Olive St., St. Louis, Mo., and Cobbs, Logan, Roos & Armstrong, by (S.) Henry C. M. Lamkin, 506 Olive Street, St. Louis, Missouri, Attorneys for Defendant.

[fols. 13-15] Continuances from July 11th to October 13, 1949 (omitted in printing).

[fol. 16] IN ANY ST. LOUIS COURT OF CRIMINAL CORRECTION

## [Title omitted]

Motion to Quasi Overruled and Cause Taken Under Advisement—Oct. 13th, 1949

Now, on this day, comes the Prosecuting Attorney for the State, and the defendant, Day-Brite Lighting, Inc., a corporation, appears in Court by and th-ough the person of its officer, and there also appears Louis J. Portner, Esq., and Messrs. Cobbs, Logan, Armstrong, Teasdale & Roos, by Henry C. M. Lamkin, Esq., attorneys for the defendant, thereupon defendant's motion to quash Count 2 of the information herein, was duly heard and considered, and was by the Court overruled; and all of the parties herein then announced ready for trial on Count 2 of the information, and to be tried by the Court on an agreed stipulation of facts; thereupon the Court ordered the trial to proceeds whereupon the agreed stipulation of facts in writing signed by all of the parties was filed, and the cause was fully heard and tried to the Court. The defendant, by its attorneys, orally moved both at the close of the State's case and at the close of the entire case for dismissal of the cause and its discharge, and each of said oral motions were duly considered by the Court and denied; and said cause was then taken under submission by the Court and passed to October 20th, 1949, for decision.

## [Title omitted]

## STIPULATION OF FACTS

It is hereby stipulated between the State of Missouri, by the Prosecuting Attorney for the City of St. Lbuis, and the Defendant, Day Brite Lighting, Inc., by its attorneys, that the facts which would be produced in evidence in the above matter would be as follows:

1. That the Day-Brite Lighting, Inc. was at the time of the filing of the Information, a Missouri corporation operating a manufacturing plant at 5401 Bulwer Avenue, in the City of St. Louis and State of Missouri; and engaged in the production of goods that moved in interstate commerce:

2. That November 5th, 1946 was a day duly designated by law for the holding of a general election in the City of St. Louis and State of Missouri, and that on said election day the polls were open from 6 A.M. to 7 P.M.;

3. That the said Defendant had in its employ one Fred C. Grotemeyer, residing at 1534 Warren Avenue; St. Louis, Missouri, who was a duly registered voter entitled to vote at the election held as aforesaid on the 5th day of November, 1946;

4. That Grotemeyer had been employed by Defendant for some five years and that he was a member of Local No. 1, International Brotherhood of Electrical Workers, which said Local had a contract with the Defendant, covering wages, hours, and other working conditions.

5. That on said November 5, 1946, said Grotemeyer was employed and under the terms of said contract paid on an hourly basis at the rate of \$1.60 per hour for each hour [fol. 18] worked, and he worked on a shift from 8.00 A.M. to 4:30 P.M., with a lunch period of 30 minutes from 12:00 to 12:30 Noon.

6. That Grotemeyer requested permission on the 4th day of November from one Wilks, Plant Superintendent for the Defendant, to absent himself for a period of four hours from his scheduled work day the next day to vote, and that the said Wilks refused him such permission. That Grotemeyer, under the contract was required to report for work at 8:00 A.M. That the company furnished a booklet setting forth the rules and regulations to all employees of the company; That this booklet provided that no employee, except in cases of sickness or emergency, should be absent from work without permission of his supervisor and even then be must report to his supervisor the reasons for failing to be at work.

8. That on the day preceding the election day in question Defendant posted a notice on its bulletin board allowing all a camployees on the day shift (including Grotemeyer) to take time off for voting at 3.90 in the afternoon, which would be 1½ hours earlier than the said Grotemeyer normally got off work; which would permit Grotemeyer to absent himself from his employment four consecutive hours between the opening and closing of the polls on said election day.

9. That Grotemeyer's house was approximately 200 feet from the polling place in which he voted; that he absented himself from his employment at 3 P.M.; that he voted about 5:00 in the afternoon and it took him about five minutes to vote; that Grotemeyer wanted four hours from his employment, namely from the noon hour on, to do campaigning to vote and to get ou, the vote; that four hours was not necessary for voting; that it only took him about 20 minutes to get from his home to his work;

10. That Grotemeyer was paid by the Defendant for only those hours worked (6½ hours) on the day in question, or for the time from 8 A. M. to 3 P. M. less the normal 30 minute lunch period; and that he was not paid for the hour and a [fol, 19] half from 3:00 to 4:30 P.M. which was normally included in his scheduled work day; and that the plant could not operate if all employees were given four hours from work to vote.

It. A witness named Jacobs who was the International Vice-President of the International Brotherhood of Electrical Workers would testify to the Union contract between the Defendant and Grotemeyer's Local; that on the day prior to the election he discussed with Mr. Wilks, Plant Superintendent for the Defendant, the question of Union members being allowed four hours off from their normal

scheduled work day, with pay for the time not worked, for

the purpose of voting during the election.

12. That he, Jacobs had been active in organized labor for 30 years, was familiar with its history in the State as he had done quite a bit of research work in the matter; that organized labor had brought about many desirable advantages and had improved working conditions for the laboring man, and that one of the advantages was a great shortening and decrease in the normal hours worked per day.

13. That basing his answer on a study of history, the average working day 50 years ago in the State was 14 to 16 hours; that it had been at least 10 hours a day in the Union to which he belonged; that the average working day in his Union was now 8 hourgand that no demand had ever been made by the Union for four hours off of the scheduled work day, on election day, with pay from the Defendant prior to the election day in question.

14. That the foregoing evidence would be all of the testi-

mony produced on behalf of the State.

15. Klingsick on behalf of the Defendant, as the Defendant's Vice-President, Treasurer and General Manager, would testify that 158 employees, worked at an average hourly rate of \$1.089 from 8:00 A. M. to 4:30 P. M.; that 58 employees worked at an average hourly rate of \$1.03 from 7:00 A. M. to 3:30 P. M., and 7 employees worked at an [fol. 20] average hourly rate of \$8646 from 7:00 A. M. to 3:00 P. M.; that the total amount of wages that would be paid to all employees for not working, if all took four hours off from scheduled work day to vote, with pay, would be \$951.42; and that 4 hours of production loss amounting to \$7,138.00 would have resulted on the day in question.

Information testified to by Grotemeyer; that he had dictated the notice placed on the bulletin board relative to the time that members of the day shift could take off for the purpose of voting; that this was done so that the employees would be informed as to the procedure to be followed on election day (if they desired to be absent) and that the hour of 3:00 in the afternoon was arrived at because that time could give employees four consecutive hours in which to

vote before the polls closed.

17. That the two Union contracts between the Defendant and the electrical workers governed the relation between the Defendant and most of its employees; that under the contracts wages were paid only for each hour worked, on an bourly rate; that a work week consisted of 40 hours divided into 8 hours a day, five days a week; that employees contracted under the Union contracts to be on the job ready to work at the scheduled starting time and to be at work until scheduled quitting time during the normal work day;

18. That the Defendant would offer in evidence testimony to show the financial loss to the employers of the State if all employees should be given four hours off with pay on election day; that the State would object to the admission of such testimony and upon the objection of the State being sustained the Defendant would make an offer of proof showing that according to the Missouri Employment Security Information Bulletin of June, 1949, published by the Missouri Division of Employment Security, that in April, 1949, in the State of Missouri there was 330,600 hourly-paid employees engaged in manufacturing industries, and 729,600 employees engaged in nonmanufacturing industries and that the average hourly earning of employees engaged in [fol. 21] manufacturing industries during the same month was \$1.302, and that figures were not available for the hourly rate for nonmanufacturing industries. The above figures did not include agricultural employment.

19. That this would be all the evidence produced on be-

half of the Defendant.

(Signed). William C. Lochomoeller, Prosecuting Attorney for the City of St. Louis, by Jasper R. Vettori, Asst. Prosecuting Attorney on Behalf of the State of Missouri, and Louis J. Portner, and Henry C. M. Lamkin of Cobbs, Logan, Armstrong, Teasdale & Roos, on Behalf of Defendant, Day-Brite Lighting, Inc.

[fol. 22] IN THE ST. LOUIS COURT OF CHIMINAL CORRECTION

# [Title omitted]

# VERDICT October 20th, 1949

Now, on this day, comes the Prosecuting Attorney for the State, and the defendant, Day-Brite Lighting, Inc., a corporation, appears in Court by and through the person of itsofficer, and there also appears Louis J. Portner, Esq., and Messrs. Cobbs, Logan, Armstrong, Teasdale & Roos, by Henry C. M. Lamkin, Esq., attorneys for the defendant; and said cause again coming on for further proceedings, the Court upon defendant's application granted defendant leave to amend the agreed stipulation of facts heretofore filed in this cause. Defendant having heretofore been discharged as to Count 1 of the information on its appeal to the St. Louis Court of Appeals, the defendant corporation is tried only on Count 2 of the information herein; and the Court having fully considered all the evidence, and the law of this cause, and the Court, being fully advised thereof and concerning the same, doth find and adjudge the defendant guilty as to Count 2 of said information and fixes its punishment at a fine of \$100.00 and costs. Defendant granted 20 days in all in which to file its motion for a new trial. Said defendant-enters into a motion for a new trial bond with D. J. Biller as security in the amount of \$200.00, returnable October 28th, 1949.

[fols. 23-25] Continuances from October 28th to November 10, 1949 (omitted in printing)

[fol. 26] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

# [Title omitted]

MOTION FOR NEW TRIAL-Filed November 9, 1949

Comes now Day Brite Lighting, Inc., a corporation, defendant in the above entitled cause, by Louis J. Portner, and George B. Logan and Henry C. M. Lamkin of Cobbs, Logan,

Armstrong, Teasdale & Roos, its attorneys, and moves the Court to set aside the finding and verdict of the Court and for a new trial in this cause, for the following reasons:

1. The verdict and finding of the Court is contrary to the law because all of the acts of the defendant produced in evidence do not constitute any violation of the law and particularly of Section 11785, R. S. Mo. 39.

2. The verdict and finding of the Court is not supported by any evidence because all of the acts of the defendant produced in evidence do not constitute any violation of the law

and particularly of Section 11785, R. S. Mo. 39.

3. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute (Sec. 11785, R. S. Mo. 39) that is unconstitutional because said statute deprives this defendant of its property without due process of law in violation of Section I of the 14th Amendment of the Constitution of the United States.

4. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute (Sec. 11785, R. S. Mo. 39) that is unconstitutional because it deprives this defendant of its property without [fol. 27] due process of law in violation of Section 10 of Article I of the Constitution of Missouri for 1945.

5. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement would constitute the taking of private property for private use in violation of Section 28 of Article I of the Constitution of Missouri for 1945.

- 6. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement denies to this defendant equal protection of the laws in violation of Section I of the 14th Amendment of the Constitution of the United States.
- 7. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement denies to this defendant equal protection of the laws in violation of Section 14 of Article I of the Constitution of Missouri for 1945.

8. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement impairs the obligation of contracts in violation of Section 10, Article I of the Constitution of the United States.

9. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement impairs the obligation of contracts in violation of Section 13, Article I

of the Constitution of Missouri for 1945.

10. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional because the Bill introduced and passed by the Legislature and signed by the Governor [fol. 28] and the amendment to said bill likewise introduced and passed by the legislature and signed by the Governor which originally contained said Section 11785, R. S. Mo. 39, contained more than one subject and the various subjects therein contained were not clearly expressed in the title of either said bill or said amendment in violation of Section 23, Article III of the Constitution of Missouri for 1945.

11. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that if the defendant should attempt to conform with the Court's interpretation of Section 11785, R. S. Mo. 39 in a manner necessary to avoid further and future prosecution for violation thereof sit would then be in violation of Section 11786, R. S. Mo. 39 in that its acts necessarily performed in attempting to comply with Section 11785 would induce or persuade an employee to vote in an election contrary to the provisions of Section 11786, R. S. Mo. 39.

12. The verdict and finding of the Court is against the evidence and against the weight of the evidence and there is no substantial evidence to support the verdict and finding.

13. The finding and verdict of the Court is against the law as found in Section 11785, R. S. Mo. 1939.

14. Because the Court erred in overruling the defendant's "Motion to Quash the Information" and "Motion to Quash Count 2" of the information filed in the above entitled cause, and erred in hearing and receiving any evidence on behalf

of the State in the said cause because as a matter of law the grounds set out in defendant's "Motion to Quash" should have been sustained in that the information filed did not charge the defendant with the violation of any law and further that the information was based on a section of the statutes, namely, Sec. 11785, R. S. Mo. 39, that is unconstitutional in that its enforcement would deprive the defendant of its property without due process of law, contrary to Sec. [fol. 29] I of the Fourteenth Amendment to the Constitution of the United States and Sec. 10 of Article I of the Constitution of Missouri for 1945, would constitute the taking of private property for private use, contrary to Sec. 28 of Article I of the Constitution of Missouri for 1945, would deny this defendant equal protection of the law in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States and Sec. 14 of Article I of the Constitution of Missouri for 1945, would impair the obligation of contracts in violation of Sec. 10, Article I of the Constitution of the United States and of Sec. 13, Article I of the Constitution of Missouri for 1945, and because the Bill of which said Section formed a part, contained more than two subjects without the same being clearly expressed in the title, contrary to Sec. 23; Article I of the Constitution of Missouri for 1945, and further that its enforcement would cause this defendant to violate Sec. 11786, R. S. Mo. 39.

15. Because the Court erred in refusing to admit relevant and material testimony in that it sustained the State's objection to introduction of testimony by the Defendant that would establish, in the event the statute in question was enforced, the money value of property that all employers in the State would be deprived of without due process of law contrary to Sec. 1 of the 14th Amendment to the Constitution of the United States and Sec. 10 of Article I of the Constitution of Missouri for 1945, and would establish the value of the private property of all employers in the State of Missouri that would be taken for private use contrary to Section 28 of Article I of the Constitution of Missouri for 1945.

16. The Court erred in overruling defendant's motion for a verdict of acquittal filed by the defendant after the submission of the Stipulation of Facts agreed to by both parties

was filed, the said Stipulation of Facts constituting all of the testimony presented to the Court by either party in said [fol. 30] cause in that the grounds contained in said motion entitled the defendant to a verdict of acquittal in that the information filed did not charge the defendant with any violation of the law and the evidence produced by the State did not show any violation of the law and further that the information was based on a section of the statutes, namely, Sec. 11785, R. S. Mo. 1939, that is unconstitutional in that its enforcement would deprive the defendant of its property without due process of law contrary to Sec. bof the Fourteenth Amendment to the Constitution of the United States and Sec. 10 of Article I of the Constitution of Missouri for 1945, would constitute the taking of private property for private use, contrary to Sec. 28 of Article I of the Constitution of Missouri for 1945, would deny this defendant equal protection of the laws in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States and Sec. 14 of Article I of the Constitution of Missouri for 1945, would impair the obligation of contracts in violation of Section 10, Article I of the Constitution of the United States and of Sec. 13, Article I of the Constitution of Missouri for 1945, and because the Bill of which said section formed a part contained more than two subjects without the same being clearly expressed in the title, contrary to Sec. 23, Article I of the Constitution of Missouri for 1945, and further that its enforcement as interpreted by the Court would cause this defendant to violate Sec. 11786, R. S. Mo. 1939.

(S.) Louis J. Portner, 509 Olive St., St. Louis, Mo., and Cobbs, Logan, Armstrong, Teasdale & Roos, by (S.) George B. Logan and (S.) Henry C. M. Lamkin, 506 Olive St., St. Louis, Mo., Attorneys for Defendant, Day-Brite Lighting, Inc., a corporation.

[fols. 31-32]. Continuances from November 10th to December 2, 1949 (omitted in printing).

[fols. 33-34] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

# [Title omitted].

MOTION FOR NEW TRIAL OVERRULED, JUDGMENT AND ORDER ALLOWING APPEAL—December 2nd, 1949

Now, on this day, comes the Prosecuting Attorney for the State, and the defendant, Day-Brite Lighting, Inc., a corporation, appears in Court by and through the person of its officer, and there also appears Louis J. Portner, Esq. and Messrs. Cobbs, Logan; Armstrong, Teasdale & Roos by. Henry C. M. Lamkin, Esq., attorneys for the defendant; whereupon the court being fully advised concerning the motion for a new trial, doth order and determine that the said motion be overruled. The eupon the court doth sentence and orders the defendant to pay a fine of \$100.00 and costs. Thereupon the said defendant by its attorneys files its affidavit for an appeal herein, and prays the court to grant It an appeal to the Supreme Court of the State of Missouri, from the judgment rendered against defendant, which said appeal is by the court granted. Thereupon the defendant enters into recognizance in the sum of \$200.00 with O. W. Klingsick, Surety, upon the condition that the defendant shall appear in the St. Louis Court of Criminal Correction at such time and place as the Supreme Court of the State of Missouri aforesaid shall direct and shall render himself in execution and obey every order and judgment which shall be made or rendered in the premises, then this recognizance shall be void, otherwise to remain in full force and effect.

\$10.00 Filing Fee Paid.

[fol. 35] Bond on Appeal for \$200.00 approved and filed December 15, 1947 omitted in printing.

# [Title omitted]

ALLOWANCE OF BILL OF EXCEPTIONS-March 13, 1950

Now, on this day, defendants Bill of Exceptions presented, allowed, signed and filed.

[fols. 37-38] Clerk's Certificate too foregoing transcript omitted in printing.

[fol. 39] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

## [Title omitted]

### DEFENDANT'S BILL OF EXCEPTIONS

Be it Remembered that heretofore, to-wit, on Thursday, October 13, 1949, Court 2 of the information in the above entitled cause came on for trial before the Honorable Louis Comerford, Judge of the St. Louis Court of Criminal Correction, and the following proceedings were then and there had and made a part of the record in said cause, as follows:

#### APPEARANCES

William C. Lochmoeller, Esq., Prosecuting Attorney for the St. Louis Court of Criminal Correction, by Jasper R. Vettori, Associate Prosecuting Attorney, appeared for the State.

Louis J. Portner, Esq., and Messrs. Cobbs, Logan, Armstrong, Teasdale & Roos, by Henry C. M. Lamkin, Esq., appeared for the defendant; and defendant appeared in Court by and through the person of Louis J. Portner, its Secretary.

# [fols. 40-44] Defendant's Motion to Quash Count 2 of the Information

Heretofore, to-wit, on the 6th day of July, 1949, the defendant, by its counsel, leave of Court being first had and

obtained so to do, filed in said cause its motion to quash Count 2 of the information, in words and figures as follows, to-wit:

Omitted Printed side page 9 aute.

[fol. 45]

MOTION OVERRULED

Whereupon the above and foregoing motion to quash Count 2 of the information filed in said cause by the defendant on said 6th day of July, 1949, was by the Court taken under advisement; that thereafter, on the 13th day of October, 1949, the above and foregoing motion to quash Count 2 of the information, filed in said cause by the defendant, was by the Court overruled.

To which action, finding and ruling of the Court in overruling said motion to quash Count 2 of the information, and in tailing and refusing to quash Count 2 of the information herein, the defendant by its counsel then and there duly objected and excepted at the time, and still objects and excepts.

Stipulation of Facts Filed

Thereupon, on said 13th day of October, 1949, the State, by its counsel, in order to maintain the charge made and contained in Count 2 of the information filed herein against the defendant, and the defendant, by its counsel, in order [fols. 46-51] to acquit itself of the charges made and contained in Count 2 of the information filed against it, filed herein, leave of Court being first had and obtained so to do, a stipulation of facts, which said stipulation was in writing and in the words and figures as follows, to-wit:

St. Louis, Oct. 13th, 1949.

Charged With Violation of Section 11,785 R. S., Missouri (1939), "Employees to Be Allowed Four Hours, Etc."

STATE OF MISSOURI, Plaintiff,

VS.

DAY-BRITE LIGHTING, INC., a Corporation. Defendant

[fol. 52] Omitted. Printed side page 17 ante.

[fol. 53] ORAL DEMURRER AT THE CLOSE OF STATE'S CASE AND .

Mr. Lamkin: I would like to have the record show that at the close of the State's evidence on behalf of the State, the defendant would demur to the evidence, and at the close of all the evidence both on behalf of the State and the defendant, the defendant will renew its demurrer. Any objection to stipulating that, Mr. Vettori?

Mr. Vettori: None whatsoever.

# ORAL DEMURRERS OVERRULED

The Court: The oral demurrer to the evidence at the close of the State's case and the oral demurrer to the evidence at the close of the entire case will be overruled.

To which action and ruling of the Court in overruling its said demurrers, the defendant by its counsel at the time then and there duly objected and excepted, and still continues to object and except.

# STIPULATION TAKEN UNDER ADVISEMENT

Thereupon the above and foregoing stipulation filed herein was by the Court taken under advisement.

#### STIPULATION A MENDER

Thereafter, to-wit, on the 20th day of October, 1949, the same parties being present as heretofore, the fellowing proceedings were had, to wit:

Mr. Vettori: Your Honor please, in this matter counsel [fol. 54] representing the defendant desires to adjust one item to the stipulation filed, which we have no objection to. In paragraph 1 they desire to add this phraseology at the termination of the paragraph as it exists now: "And engaged in the production of goods that moved in interstate commerce." May that be added to the stipulation filed with the Court and considered a part of the evidence in this case!

The Court: It may be so amended.

### VERDICT AND JUDGMENT

The Court: Now, after considering the stipulation of agreed facts in this case, the Court finds the defendant corporation, Day Brite Lighting, Incorporated, guilty as charged in Count 2 of the information, and fixes its punishment at a fine of One Hundred Dollars.

# MOTION FOR NEW TRIAL

Thereafter, to-wit, on the same day, the said 20th day of October, 1949, the defendant by its counsel obtained leave of Court to file its motion for a new trial within twenty days.

Thereafter, to-wit, on the 9th day of November, 1949, being within twenty days after the rendition of said verdict and judgment herein the defendant by its counsel, leave of Court being first had and obtained so to do, filed in said cause its motion for a new trial in words and figures as fol-[fols. [5-61]] lows, to-wit:

Omitted Printed side page 26 ante.

[fol. 62] MOTION OVERRULED

Whereup in the above and foregoing motion for a new trial filed in said cause by the defendant on said 9th day of November, 1949, was by the Court taken under advisement; that thereafter, on the 2nd day of December, 1949, the above and foregoing motion for a new trial, filed in said cause by the defendant, was by the Court overruled.

To whick action, finding and ruling of the Court, in overruling the said motion for a new trial, and in failing and refusing to grant it a new trial in said cause, the defendant, by its counsel, then and there duly objected and excepted at the time, and still objects and excepts.

#### SENTENCE

Thereafter, to-wit, on said same day, the said 2nd day of December, 1949, the defendant appearing in Court by and [fol. 63] through the person of Louis J. Portner, its Secretary, the Court formally sentenced the defendant as follows:

The Court: The Court will now sentence the defendant company in accordance with the verdict heretofore ren-

dered on October 20, 1949. The Court finds the defendant Day-Brite Lighting, incorporated, a corporation, gailty, and the Court new sentences said defendant corporation, Day-Brite Lighting, Incorporated, to pay a fine of one hundred dollars and costs; and on its failure to pay such fine, the State may have execution to issue.

#### APPIDAVIT FOR APPEAL

And thereafter, on said same day, the said 2nd day of December, 1949, the defendant by its counsel, leave of Court being first had and obtained so to do, filed in said cause its affidavit for an appeal to the Supreme Court of the State of Missouri from the verdict and judgment rendered in said cause against it, which said affidavit for appeal was in writing in the words and figures as follows, to wit:

"IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION.

STATE OF MISSOURI

VS.

## DAY-BRITE LIGHTING, INC.

Charged With Violation Sec. 11785 R. S. Mo. 1939

And now comes the defendant oy O. W. Klingsick, Vice-President, in the above entitled cause, who being first duly [fol. 64] sworn upon his oath says: That the appeal in the above entitled cause is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the Judgment or decision of the Court.

(Signed) Day-Brite Lighting, Inc., O. W. Klingsick, Vice-Pres.

Sworn to and subscribed before me, this 2nd Day Dec. 1949. (Signed) Ernest Stoecklin, Clerk. (Seal.)"

Thereupon, to-wit, on the said 2nd day of December, 1949, the above and foregoing affidavit filed in said cause by the defendant was, by the Court, taken up and examined and, upon finding the same to be in proper statutory form, the Court granted to the defendant an appeal from the verdict and judgment rendered in this Court to the Supreme Court of the State of Missouri.

# ALLOWANCE OF BILL OF EXCEPTIONS

And now, inasmuch as the foregoing evidence, proceedings, matters and things, rulings and exceptions, do not appear of record, and in order that the same may be made a part of the ecord in this cause so as to be presented to said Supreme Court of Missouri, the defendant here now presents to the Court this, its Bill of Exceptions in said cause, and prays that the same may be settled and allowed, [fol. 65] approved, signed, sealed and filed, and ordered made a part of the record in this cause, all of which is accordingly done this 13th day of March, 1950.

Louis Comerford, Judge of the St. Louis Court of Criminal Correction, presiding at the trial of the above cause.

Approved Louis J. Portner, Cobbs, Logan, Armstrong, Teasdale & Roos, By Henry C. M. Lamkin, Attorneys for Defendant, Appellant; Jasper R. Vettori, Associate Prosecuting Attorney for the St. Louis Court of Criminal Correction, representing the State of Missouri, Respondent.

[fol. 66] IN THE ST. LOUIS COURT OF APPEALS, ARBIL SESSION, 1949

o No. 27658

STATE OF MISSOURI, Plaintiff-Appellant,

VS.

THE DAY-BRITE LIGHTING, INC., a Corporation, Defendant-Appellant

Appeal from the St. Louis Court of Criminal Correction

Hon, Louis Comerford, Judge

OPINION FILED-May 17, 1949

There being a separate appeal by each party, in order to avoid confusion the plaintiff below will be referred to as the State, and the defendant below as the defendant.

On the 24th day of June, 1947, the associate prosecuting attorney filed an information in the St. Louis Court of Criminal Correction, containing two counts, charging the defendant with having violated the provisions of Section 11785, R. S. Mo., 1939, Mo. R. S. A. Sec. 11785. The first count charged that the defendant, on November 5, 1946, an election day, failed and refused to allow Fred C. Grotemeyer, one of its employees; who was entitled to vote at the election, to absent himself from his employment for a period of four hours between the times of the opening and closing of the polls. The second count charged the defendant with having penalized said employee by deducting from his wages the amount of his earnings for the time he was absent from his work in the exercise of his privilege of being absent [fol. 67] therefrom for a period of four hours to vote at said election.

Thereafter, the court overruled defendant's motion to quash the first count of the information, and sustained defendant's motion to quash the second count. From the judgment quashing the second count the State has appealed. The defendant was tried on the first count, a jury being waived, and was convicted and its punishment fixed at a fine of \$100.

From the judgment of conviction on the first count the defendant appeals.

The prosecution, as above stated, is under Section 11785,

R. S. Mo., 1939, Mo. R. S. A. Y178, which is as follows:

"Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty: Provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly; violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

The facts are not disputed and are as follows:

The defendant is the employer of about 200 workmen, who were divided into shifts or groups, as to their working hours. Fred Grotemeyer, who had been in the employ of defendant for about five years, worked on a shift which began work at 8:00 o'clock a. m. and worked until 4:30 o'clock p. m. with one-half hour off during the noon hour for lunch. His wages [fol. 68] were \$1.60 per hour. The day before the election held on November 5, 1946, the defendant caused to be placed on a bulietin board maintained for the purpose of official notices to its employees a notice as follows:

"Day-Brite Lighting, Inc. 5411 Bulwer Avenue, St. Louis, Missouri. November 4th, 1946. Employees on day shift only wishing to take time off for voting November 5th may do so by leaving work at three p.m. Day-Brite Lighting, Inc."

On November 4th, Grotemeyer saw Mr. Wilks, who was defendant's plant supreintendent, and asked him "How about getting off at noontime according to the law, with pay, four hours from work?," and Mr. Wilks, told him "no." The next morning (election day) Grotemeyer again saw Wilks, and the following question and answer appear in the transcript:

"Q. What conversation did you have with him, if any, pertaining to this bulletin you saw displayed?

"A. I asked him about the bulletin board. I told him—let me phrase myself right here. According to law we should have four hours off from work with pay. He says no. He says it is on the bulletin board. You can get off at three o'clock but you will not be paid for that bour and a half."

Grotemeyer testified that it would take him about twenty minutes to go from his working place to his home, and that his polling place was within 200 feet of his home. That on November 5, 1946, he voted about 5:00 o'clock in the afternoon, and it took him about five minutes to vote. He said that he wanted time off from the noon hour on in order to do a little campaigning, canvass to get out the vote.

There was evidence that fifty years ago, about the time of the enactment of Section 11785 (Laws 1897, p. 108), the working day was at least ten hours, and the average was [fol. 69] fourteen to sixteen hours, and that today eight

hours is the average working day.

The working contracts between the defendant and the labor union to which Grotemeyer belonged show that wages were paid the employees on an hourly rate; that the work consisted of forty hours of five eight-hour days, from Monday to Friday, both inclusive, and that the employees contracted to be on the job ready to work at the starting time and to be at work until quitting time (except on specified holidays and vacation periods, concerning which there is no issue in this case).

Both appeals in the case were taken to the Supreme Court, where the briefs were filed, and the Supreme Court made an order as follows: "Now at this day it appearing to the satisfaction of the Court that there is no constitutional question

in a jurisdictional sense presented in the above-entitled cause, the Court doth order that said cause be and the same is hereby transferred to the St. Louis Court of Appeals."

If the Legislature or the courts in construing legislative acts were required to draw distinctions with hair-like accuracy as to what would constitute taking property without due process of law, there are few laws looking to the health and safety and working conditions of employees which would not come under the constitutional inhibition. It cannot be said that a constitutional question is involved in a jurisdictional sense as to the legislative right to adopt reasonable regulations for the operation of corporations, which are themselves creatives of statutes, and which regulfol, 70] latiens might place an inconsequential burden on the corporation. In the case of Noble State Bank v. Haskell, 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, the question involved was whether ar assessment against banks for the purpose of creating a Depositors' Guaranty Fund came within the inbibition of the due process clause of the federal Constitution, and the Court said (219 U. S. 110, 111):

"In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have a few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a notumus murare as against the law-making power.

"The substance of the plaintiff's argument as that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interestin its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see Receiver of Danby Bank v. State Treasurer, 39

Verment, 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of eases that an ulterior public advantage may justify a comparatively insignificant taking of privateproperty for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361. Strickley v. Highland Boy Mining Co., 200 U. S. 527, 531. Offield v. New York, New Haven & Hartford R. R. Co., 203 U. S. 372. Bacon v. Walker, 204 U.S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

[fol. 71] And so it resolves itself into a question of whether the taking is reasonable and necessary to carry into effect the object and purpose of the legislative enactment with as little burden as possible on either the employee or the employer. In other words, if the taking is for a public good and is so comparatively insignificant with the benefit to the State of the law, so that no two logical minds could differ, the persons affected could not claim, at least in a jurisdictional sense, that the Constitution was involved in a construction of the meaning of the law. Such would be this case, where the least possible burden is case on the employer in where to accomplish the purpose of the law, and so, as said by the Supreme Court in transferring the case to this court, "There is no constitutional question in a jurisdictional sense presented."

In view of the fact that there is no constitutional question in a jurisdictional sense presented in this case, most of the able and exhaustive arguments and briefs are not applicable to the questions we must determine on these appeals, which

is simply the logical meaning of the words of the statute. On the other hand, we must not lose sight of the provisions of the Constitution, lest we, in determining the meaning. of Section 11785, attribute to it a meaning which would violate any of the provisions of the organic law. Where a statute is capable of two interpretations, one of which is constitutional and the other unconstitutional, the courts will interpret the language in favor of constitutionality. State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 342, Mo. 365, 115 S. W. 2d 816. And the court of appeals has [fol. 72] the duty to construe the meaning of a statute and to give it a reasonable and logical meaning, if such can be done, and with a view that the statute as construed is a reasonable and constitutional exercise of legislative functions. In re H—— S——, 236 Mos App. 1296, 165 S. W. 2d 300; Kelly v. Howard, 233 Mo. App. 474, 123 S. W. 2d 584.

That every citizen should be given both the right and the opportunity to vete is a matter of public interest, and any law having for its purpose the guarantee of such right and opportunity should be upheld if it is possible to do so. Such we take it was the legislative purpose in the enactment of Section 11785. And the purpose or legislative intent was not to financially enrich the voter or to place an unnecessary and unreasonable burden on the employer. It was not intended to apply only to large industrial corporations, but applies with equal force to the employer of the clerk in a crossroads store, the domestic servant in the home, and the laborer on a farm.

To say this section is devoid of uncertainty or ambituity would be begging the question. One theory advanced is that under this section the employee is entitled to four hours' absence from his regular working hours on the day of election, whereas another theory advanced is that the employee is entitled to four hours' time in which to vote during the thirteen hours comprising an election day. This last stated theory, which we think is correct, means that if the employee's regular working day leaves him at least four consecutive hours on election day during which he would not be engaged in actual service to his employer, the object [fol. 73] and purpose of the statute has been met, and such employee is not entitled to be absent from his regular work-

ing hours at all; or, if such time when the employee is not actually engaged in service to his employer is less than four hours (in this case two and one-half hours), the employer shall permit the ab-ense of the employee from his services for a sufficient time (in this case one and one-half-hours) to make up four full hours. Obviously the two opposing views bring about different results. For instance, if the views of the State prevail, as to this employee, he would quit . his work at the noon hour, thereby having seven hours aime in which to vote, and the employer would have to pay him \$6.40 for four hours of services which were not rendered. whereas if our view of the statute is correct, this employee swould quit work at 3:00 O'clock p. m. instead of 4:30 p. m. thus depriving the employer of only one and one-half hours of service instead of four hours, and the employee would have four full hours to vote. Suppose the employed is working on a shift from 4:00 a. m. to 12:00 noon. If the State is correct in its view of the statute the employer would be compelled to grant absence on pay to the employee for four hours before 12:00 noon, regardless of the fact that such employee could be on his job until 12:00 noon and . then have seven hours' time in which to vote. On this theory the employee would have eleven hours out of the election day. thirteen hours.

If the views of the State are correct there would indeed be a constitutional question involved, not only under the "due process" clause of Section 1, Amendment XIV to the [fol. 74] Constitution of the United States, and Section 10, Article I. Constitution of Missouri, 1945, but also under the "equal protection of the laws" clause of Section 1, Amendment XIV to the Constitution of the United States, and Section 14, Article I, Constitution of Missouri, 1945, beeuase of an unnecessary, arbitrary and unreasonable burden being visited upon the employer, whether it be an individual or corporation, in order to accomplish the simple purpose of the employee having four hours on an election day in which to vote. Then why give the statutory words a strained construction which would invalidate it, if the words are just as susceptible to a meaning that makes iv a reasonable and valid law? The Legislature most assuredly had in mind the Constitution, and its various provisions, when it enacted the law, and it is the legislative

intent we are seeking in construing the law.

· The primary rule of construction of statutes is to ascertain and give effect to the lawmakers' intent. It is of significance that this statute was enacted over fifty years ago, when working hours ranged from ten to sixteen hours a day. It was at that time that the words were used that the employee "be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls." (Italics ours.) The italicized words would be useless and have no place in the sentence where used if the four-hour period is to be restricted to the employee's regular working hours, as the State would con-But even in that day there were many employees whose service ended at noon, or by 3:00 o'clock in the [fol. 75] afternoon, and we can see no reason why the lawmakers intended to require the employer to give such employee more time to vote, if his regular working schedule gave him a full four hours of free time. Then there was added the proviso, "that his employer may specify the hours during which such employee may absent himself as aforesaid." "As aforesaid" could only mean four hours between the times of opening and closing the polls. The law-makers intended to secure to every citizen both the right and the opportunity to vote. If the voters' regular working hours already gave him the four-hour opportunity to vote, there was no useful purpose in the section at all as to such employee. If the voter already had two and onehalf hours' free time, as did Grotemeyer, then if the employer gave him an additional one and one-half hours, the purpose of the law would be met by Grotemeyer's having four full hours in which to vote, and with no more inconvenience and expense to the employer than were necessary and reasonable to effect the purpose of the law. Thus viewing Section 11785 the defendant was improperly convicted under the first count of the information.

The second count of the information presents a different question. It charged that the defendant penalized Grotemever by deducting from his salary the amount of. his earnings for the time he was absent from his regular working hours in the exercise of his voting privilege, which in this case would be one and one-half hours. If the defendant did that it was clearly a violation of Section 11785, which declares any employer guilty of a misdemeasor who "shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege." [fol. 76] (Italics ours.)

This part of the section is not ambiguous and needs no elucidation. It provides in plain and simple words that there shall be no deduction of wages because the employee exercises the privilege of having a full four hours during the election day thirteen hours in which to vote. If it required one and one-half hours from his regular working day to make up the four hours, and the defendant deducted from his wages for the one and one-half hours, the defendant would clearly be guilty of a violation of the section under the second count of the information.

It follows that the judgment of conviction of the defendant, under the first count of the information, should be reversed, and that the judgment quashing and dismissing the second count of the information should be reversed and the cause remanded for trial on such second count. It is so ordered.

Wm. C. Hughes, Judge.

Lyon Anderson, Presiding Judge, concurs, Edward J. McCullan, Judge, concurs.

[fol. 77] · IN THE ST. LOUIS COURT OF APPEALS

Thesday, May-17, 1949

No. 27658

STATE OF MISSOURI, Plaintiff-Appellant,

VB.

St. Louis Court of Criminal Correction No. 278 June 1947
THE DAY-BRITE LIGHTING, INC., a Corporation, DefendantAppellant-

JUDGMENT-Filed March 24, 1950

Now again come the parties aforesaid, by their respective attorneys, and the Court, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment of conviction of the defendant, rendered herein by the St. Louis Court of Criminal Correction under the first count of the information, be reversed and for naught held and esteemed; and that the judgment quashing and dismissing the second count of the information be reversed and the cause remanded to said Court for trial on such second count. Opinion filed.

[File endorsement omitted.]

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 78] Argument and submission (omitted in printing),

## IN SUPREME COURT-OF MISSOURI

No. 41979

STATE OF MISSOURE Respondent,

VS.

DAY-BRITE LIGHTING, INCORPORATED, a corporation, Appellant

JUDGMENT-November 13, 1950

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis Court of Criminal Correction rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (The opinion by Division 1 of the Supreme Court of Missouri was adopted by the Supreme Court en banc as its opinion on June 12, 1951, a copy of which opinion is hereinafter certified.)

[fol. 79] IN SUPREME COURT OF MISSOURI

[Title omitted]

Motion for Rehearing or to Transfer to Court En Banc-November 28, 1950

Comes now the appellant, by attorney, and files a motion for a rehearing in the above-entitled cause or to transfersaid cause to the Court en Banc, with service shown.

3

# IN SUPREME COURT OF MISSOURI

#### [Title omitted]

ORDER GEANTING MOTION-December 11, 1950

Now at this day, the Court having seen and fully considered the motion of the appellant for a rehearing in the above entitled cause, doth order that said motion be, and the same is hereby overruled.

And now at this day, the Court having seen and fally considered the motion of the appellant to transfer this cause to the Court en Banc, doth order that said motion be, and the same is hereby sustained upon the ground that a Federal question is involved.

[fol. 80] Argument and submission (omitted in printing).

IN SUPREME COURT OF MISSOURI

No. 41979

STATE OF MISSOURI, Respondent,

VS.

DAY-BRITE LIGHTING, INC., a Corporation, Appellant

JUDGMENT-June 11, 1951

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the St. Louis Court of Criminal Correction rendered, he in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinions filed.)

[fol. 81] IN THE SUPREME COURT OF MISSOURI, EN BANC, APRIL SESSION, 1951

No. 41979

STATE OF MISSOURI, Respondent,

VS.

DAY-BRITE LIGHTING, INC., a Corporation, Appellant
Appeal from the St. Louis Court of Criminal Correction

Honorable Louis Comerford, Judge

Opin on-Filed June 11, 1951

This is an appeal from a conviction in the St. Louis Court of Criminal Correction by which defendant appellant (here-inafter designated as defendant) was adjudged to pay a fine of one hundred dollars for violation of Section 11785, Mo. R.S.A. The case was tried on an agreed statement of facts. The two questions for determination are whether (a) the facts support the verdict and (b) whether that part of the section under which defendant was convicted is violative of the constitutional rights of defendant as guaranteed it under the Constitutions of the United States and the State of Missouri.

Section 11785, enacted in 1897 (Laws 1897 [Section 1] p. 108), reads: "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such yoter shall not, because of so absenting himself, be liable to any penalty: Provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby [fol. 82] conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly violate the provisions of this section, shall be deemed guilty of a misdemeanor,

The information, as originally filed, charged defendant in count one with refusing to permit its employee (Fred C. Grotemeyer) to absent himself from his employment for a period of four hours between the time, of opening and closing of the polls on the general election day of November 5, 1946; in count two with penalizing him by deducting from his salary the amount of his earnings for the time he was absent from his work on that day. Defendant's conviction under count two is the basis of this appeal. For a history of the case prior to this appeal, see State v. Day-Brite Lighting, Inc., 220 S. W. 2d 782.

Defendant, a Missouri corporation, operated a manufacturing plant in the City of St. Lenis and its products "moved in interstate commerce". Fred C. Grotemeyer was and for several years prior to November 5, 1946, had been in its employ. He was a member of Local No. 1, International Brotherhood of Electrical Workers, which had a contract with defendant covering wages, hours and other working conditions of its employees. A work week consisted of forty hours, divided into five eight hour days. Grotemeyer was paid on an hourly basis at the rate of \$1.60 per hour for each hour worked. His work day began at 8:00 a.m. and closed at 4:30 p.m., with a lunch period of thirty minutes from 12:00 to 12:30 noon. He was to receive pay only for hours actually worked. The rules of defendant o provided that no employee, except in cases of sickness or emergency, should be absent from work without permission.

On the day prior to the general election of November 5, 1946, Grotemeyer, who was qualified to vote in that election, asked permission to absent himself for a period of four [fol. 83] hours between the beginning and end of his scheduled work day "to do campaigning, to vote and to get out the vote". This specific request was refused, but defendant on that day posted on its bulletin board a notice permitting all employees on the day shift (including Grotemeyer) to take time off to vote at 3:00 p.m., on November 5th. This was one and one-half hours earlier than Grotemeyer's work day normally would end, but it did permit him to absent himself from his employment for four consecutive hours

between the opening and closing of the polls, which were 6:00 a.m. and 7:00 p.m. On November 5th, Grotemeyer absented himself from his employment at 3:00 p.m. and thereafter voted. He was paid by defendant only for those hours worked on November 5th, to-wit: six and one-half hours, or the time from 8:00 a.m. to 3:00 p.m., less the thirty minute lunch period.

One hundred fifty-eight of defendant's employees worked at an average hourly rate of \$1.089 from 8:00 a.m. to 4:30 p.m.; fifty-eight employees worked at an average hourly rate of \$1.03 from 7:00 a.m. to 3:30 p.m., and seven employees worked at an average hourly rate of \$.8646 from 7:00 a.m. to 3:00 p.m. The total amount of wages paid all employees for not working, if all took four hours off from the scheduled work day to vote, would be \$951.42, and four hours of production loss amounting to \$7138.00 would have resulted. In April, 1949, there were 230,600 hourly-paid employees in the State of Missouri engaged in manufacturing industries and 729,600 employees in non-manufacturing industries, and the average hourly earnings of these employees in manufacturing industries was \$1.302.

Defendant's first contention is that under the agreed statement of facts no violation of Section 11785 was shown. Its argument runs in this wise: "It is not charged defendant threatened to discharge or did discharge Grotemeyer or subject him to any penalty or deduction of wages earned because of the exercise of the privilege of voting. Grotemeyer was paid the amount due him for the work he did for Day-Brite Lighting, Inc. He was not penalized for voting or for taking time off for voting." [fol. 84] This contention is not sound. It is the clear intendment of the act that the employee shall be paid during his authorized absence as though he had worked. Otherwise, of course, there could be neither penalty nor deduction. It would be an impossibility for the two necessary elements of the offense, to-wit: absence from work and deduction of wages during such absence, ever to come into coexistence under defendant's contention. Regardless of the validity of the act on constitutional grounds, its meaning is clear

and the deduction of one and one-half hours from Grote-

meyer's wages was a wiolation of its terms.

The grounds on which defendant challenges the constitutionality of Section 11785 are: (1) Siglation of the due process clauses of the Constitution of the United States, as defined in Section 1 of the Fourteenth Amendment, and the Constitutions of the State of Missouri, as defined in Section 10 of Article I; (2) denial of the equal protection of the laws to all persons within its jurisdiction, as defined in Section 1 of the Fourteenth Amendment of the Constitution of the United States and of Section 14 of Article I'of the Constitution of Missouri; (3) impairment of the obligation of contracts as guaranteed by Section 10 of Article I of the Constitution of the United States and Section 13 of Article I of the Constitution of Missouri; and (4) violation of Section 28 of Article IV of the Constitution of Missouri of 1875, and of Section 23 of Article III of the Constitution of Missouri of 1945, which provide that no bill shall contain more than one subject, which shall be clearly expressed in its title. (There is another general claim of unconstitutionality which we consider inadequate and which is disposed of later herein.)

The state contends defendant has not properly raised the question of constitutionality. Each of these grounds, with the exception mentioned, was set forth with particularity in a timely motion to quash, the motion for new trial, and in defendant's brief. That is sufficient. Section 4125, Mo. [fol. 85] R. S. A.; State v. Hammer, 333 Mo. 40, 61 S. W. 2d 965, 966. Especially is this true where it is evident from the entire record that the only issue before either the trial court or this court, except that the facts did not support the verdict, was the constitutionality of that part of the section under which defendant was charged. City of St. Louis v. Friedman, 358 Mo. 681, 685, 216 S. W. 2d 475, 477.

It is apparent that Section 11785 is violative of the due process clauses of both the Federal and State Constitutions unless its enactment is within the police power of the State.

The State has placed in its brief a tabulation of statutes dealing with the right of employees to absent themselves on election days. Sixteen states make it unlawful for the employer to dock the employee's wages during such absence, to wit: Arizona, California, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, New York,

Ohio, South Dakota, Texas, West Virginia and Wyoming. Colorado and Utah statutes provide that there shall be no dockage except when the employee is paid by the hour. Six states authorize absence of the employee on election days, with no provision for payment of wages. Illinois and Kentucky statutes relating to the same subject matter have been held unconstitutional. A New York statute has been held constitutional.

Defendant strongly relies upon the case of People v. Chicago, Milwaukee & St. Paul Railway Co., 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610. It held unconstitutional a statute similar to Section 11785 on grounds that it deprived the employer of its property without due process of law, denied equal protection of the laws and was an unreasonable abridgment of the right to contract. That opinion was written in 1923. It is interesting to note that in 1944, the same court, referring to its 1923 opinion, commented: "It is urged that the State may not take private property nor. money for a private use of , and the case of People v. Chicago, Maand St. P. R. Co., 306 Ill. 486, 138 N. E. 155. 158, 28 A. L. R. 610, is cited in support of such contention. · However, this [pay-while-voting] statute, re-enacted and amended from time to time, still contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. The growing complexity of our economic interests has inevitably led to an increased use of regulatory measures in order to protect the individual so that the public good is reassured by safeguarding the economic structe e upon which the good of all depends." Zelney v. Murphy, 387 III. 492, 56 N. E. 2d 754, 757.

Defendant also cites the case of Illinois Cent. R. Co. v. Commonwealth, 305 Ky. 632, 204 S. W. 2d 973, in which the Court of Appeals of Kentucky held a pay-while-voting statute of that state unconstitutional. The decision in this case was based on the 1923 Illinois decision. It extols at great length the sanctity of the voting privilege and holds constitutional that part of the statute giving the employee the right to absent himself for a period of four hours on election day, but condemns as violative of due process the

part making it a misdemeanor to withhold his wages for so doing.

The opinion states: "The Commonwealth makes the contention that our legislative authority had a right, under the exercise of its police power, to adopt the law in question, since its adoption was in the interest of the general welfare of the public. . . However, we have said that the legislative authority may not, under the guise of promoting public interest, arbitrarily interfere with private business. City of Louisville v. Kuhn, 284 Ky. 684, 145 S. W. 2d 851. And it is always appropriate to remember that the police power is not without its limitations, since clearly it may not unreasonably invade and violate those private rights which are guaranteed under either federal or state constitution. 11 Am. Jur. 992." Thus, the opinion goes from premise to conclusion, with no statement of the reasoning by which it was reached. It is not helpful. .

As against the Illinois and Kentucky cases, the state cites the case of People v. Ford Motor Co., decided by Ap-[fol. 87] pellate Division of the Supreme Court of New York in 1946, 271 App. Div. 141, 63 N. Y. S. 2d 697. That case held constitutional a New York statute which makes it a misdemeanor to refuse an employee the privilege of voting or to deduct from his wages for exercising the privilege. We quote portions of it: The statutes in question, in force for more than half a century odeal directly with a detail as to the exercise of the elective franchise a subject matter which, under our form of government, is in itself a primary . act of sovereignty. To take measures to insure the fulland free performance of that act is therefore in the interest of the general welfare, and as such may be said to call forth 'society's natural right of self defense' which is inherent in sovereignty itself and which has been generally termed the police power.

"An employer-employee relationship may be said to have in it such a power of dominance on the part of the employer as is capable of thwarting the wholesome exercise of the right to vote at an election. The fact that such abuses have occurred is historical. To avoid such evils, to encourage the right of suffrage, to keep it pristine and render it efficient—all this pertains to the public welfare and, in the

attainment of those objectives, the burden which the statutes cast upon all in the role of an employer is one lawfully placed in a design for the common good, and the burden is so slight that it may not be said to be unduly oppressive. That the burden may bear unequally does not render its placement unlawful."

A precise definition of police power is not found. "It is not susceptible of circumstantial precision because none can foresee the ever changing conditions which call for its exercise. Moreover, it has been held that these conditions render it inadvisable to define the power accurately." 11

Am. Jur., Constitutional Law, § 246, pp. 970, 971.

"Judge Cooley says that the police power of a state 'embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to [fol. 88] prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is creasonably consistent with a like enjoyment of rights by others,' and the courts have quoted this definition with approval many times. Finally, it has been said that by means of this power the legislature exercises a supervision over matters involving the common welfare and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large. 1d. § 247, 972, 973.

Discussing police power, this court said in Household Finance Corporation v. Shaffner, 356 Mo. 808, 818, 203 S. W. 2d\*734, 739; "Section 3, Article I, states that the police power of the state remains exclusively in the people; and Section 3, Article XI, provides that 'the exercise of the police power of the state shall never be surrendered.' It is a familiar principle that "the state constitution is not a grant of power, but only a limitation, as far as the legislature is concerned; and, therefore except for the limitations imposed thereby 'the power of a state legislature is unlimited and practically absolute'. 11 Am. Jur. 894, Sec. 193."

The police power of the state is frequently invoked in

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legislation relating to the economic and physical welfare and safety of employees and the public in general, all of which are an expense to the employer of the manufacturer; and such legislation is uniformly held constitutional in principle. Some of them are: workmen's compensation laws, unemployment compensation laws, semi-monthly payment of wage laws, minimum wage and hour laws, Sunday labor laws, and the great multiplicity of safety and health laws. See cases referred to in State v. Day-Brite Lighting, Inc., supra, l. c. 784; Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 81 L. Ed. 1245; Steward Mach. Co. v. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293; Noble State Bank v. Haskell, 219 U. S. 104, [fol. 89] 31 S. Ct. 186, 55 L. Ed. 112.

If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also. The right of universal suffrage is the attribute of sovereignty of a free people. We accept as a verity that "Eternal vigilance is the price of liberty". For the vast majority the only opportunity to exercise that vigilance is in the polling place.

"That every citizen should be given both the right and the opportunity to vote is a matter of public interest, and any law having for its purpose the guarantee of such right and opportunity should be upheld if it is possible to do so. Such we take it was the legislative purpose of the enactment of Section 11785. And the purpose or legislative intent was not to financially enrich the voter or to place an unnecessary and unreasonable burden on the employer. " " "State v. Day Brite Lighting, Inc., supra, I.c. 785.

Appellant agrues that: "The Company is deprived of property of two kinds under this Statute. It is deprived of tangible property, that is, money that it is forced to pay to its employees for work not performed and for which the Company receives nothing. \* If all employees were granted four hours off with pay from the scheduled work day it would cost the Company in this case \$951.42 by way of pay to its employees and an additional sum of \$7138.00 for loss of production."

It does not necessarily follow, however, that the act is thereby rendered unconstitutional. The figures quoted above have little probative value. They do not show, nor is there any evidence tending to show—either percentage-wise or otherwise—, their relationship to the overall cost of

defendant's products.

In a well documented article on the subject of "Pay While Voting" in the Columbia Law Review of 1947, page 140, the writer makes this statement: "Whatever may be the wisdom of pay while voting statutes, they do not appear so arbitrary or unreasonable as to violate due process require-[fol. 90], ments. The burden imposed on the employer is relatively slight and the interest subserved, the right to vote, relatively high."

When we consider the infrequency with which elections are held in comparison with the total working days in a calendar year, we cannot say as a matter of law that the economic burden placed on employers by this statute is

unreasonable.

To secure the free and open elections guaranteed by our State Constitutions (Constitution of 1875, Sec. 9, Art. II; Constitution of 1945, Sec. 25, Art. I), the General Assembly enacted legislation (Laws 1893, p. 157) to prevent corrupt practices in elections. Section 11785 was not in that act, but in 1897 (Laws 1897, p. 108) it was amended to include the present Sections 11785 to 11787. The Legislature, in effect, thereby declared that in order to more adequately secure free and open elections it was expedient to require employers to afford their employees not only an opportunity to vote but also that they might exercise that right without penalty or deprivation of wages.

In determining whether a statute is constitutional it is not the province of courts to determine its wisdom or adequacy. "The basic principles that courts only look to the constitutionality of legislation, and not to its propriety, justice, wisdom, necessity, expediency, or policy have constantly been applied in cases involving police regulations. If an act had a real and substantial relation to the police power, then no matter how unreasonable or how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds." 11 Am. Jur. § 306, p. 1089.

"If there is any reasonable basis upon which the legisla-

tion may constitutionally rest the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. All facts becessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of [fol. 91] the courts . . . Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws.' . Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 1147, 125 S.W. 2d 23, 31,

We conclude that the provisions of Section 11785 are within the police power of the state and do not violate the due process clauses of either the Federal or State Constitu-

tions.

Defendant invokes the last clause of Section 1 of the Fourteenth Amendment of the United States Constitution which forbids any state to deprive any person the equal protection of the laws (and refers to Section 14, Article I, Constitution of Missouri as a corollary). The cases cited in its brief support the principle announced in the amendment, but they are not decisive of the question involved here. They are: Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254; Frost v. The Corporation Commission of the State of Oklahoma, 278 U. S. 515, 73 L. Ed. 483; State v. Miksicek, 225 Mo. 561, 125 S.W. 507; State v. Empire Bottling Co., 261 Mo. 300, 168 S.W. 1176; Ex Parte French, 315 Mo. 75, 285 S.W. 513; State v. Taylor, 351 Mo. 725, 173 S.W. 2d 902.

Defendant's argument is: "It is submitted that the statute in question violates this constitutional guarantee in that it singles out as a class those who employ labor as against those who do not. It even goes further to single out one part of the labor-employing class; namely, those who employ labor on an hourly paid basis as opposed to those who employ labor paid by the week or the month."

The courts have often decided that the classification of the relations of employers are proper and necessary for the welfare of the community. Truax v. Corrigan, supra. When all persons within the purview of a statute are subjected to like conditions, then they are afforded equal protection of the law. Stone v. City of Jefferson, 317 Mo. 1, 293 S.W. 780; Hull.v. Baumann, 345 Mo. 159, 131 S.W. 2d 721; St. Louis

Union Trust Co. v. State of Missouri, 348 Mo. 725, 155 S.W. 2d 107. " \* as long as the law operates alike on all [fol. 92] members of a class \* \* it is not subject to any objections that it is special or class legislation." 11 Am. Jur., Constitutional Law, § 478, p. 144.

Section 11785 is singularly free from the criticism levelled against it by this assignment. It applies with complete uniformity of duty and privilege, respectively to all employers and to all employees, without regard to the method of computing their compensation. This contention is ruled against defendant.

Defendant contends that Section 11785 violates Section 10, Article I, of the Constitution of the United States and Section 13, Article I, of the Constitution of Missouri. These sections forbid legislation impairing the obligations of contracts.

Freedom of contract is always qualified by valid police. regulations. "This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day in limiting hours of work of employees in manufacturing establishments \* ; and in maintaining workmen's compensation laws \* . In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from · · · West Coast Hotel Co. v. Parrish, oppression. 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330.

In the case of Gideon-Anderson Lumber Co. v. Hayes, 348 Mo. 1085, 156 S.W. 2d 898, 899, this court quoted with approval from Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 202, 31 S. Ct. 164, 169, 55 L. Ed. 167, as follows: "It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot [fol. 93] be lawfully made at all; and the power to make

contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

Having determined that the subject matter of Section 11785 is within the police power of the state, that it is not shown as a matter of law to be unreasonably burdensome, and that it is calculated to protect the general welfare of the people, we hold it does not unconstitutionally impair the obligations of the contract between defendant and its

employees.

Is the act, of which Section 11785 is a part, in contravention of Section 23, Article II, Constitution of 1945? This provision was also in the Constitution of 1875 as Section 28, Article IV. It provides that "no bill \* \* shall contain more than one subject, which shall be clearly expressed in its title". Section 11785 is an amendment to the "corrupt practice act" of 1893 (Laws 1893, p. 157). The title of the original act is: "An Act to prevent corrupt practices in elections, to limit the expenses of candidates, to prescribe the duties of candidates and political committees, and provide penalties and remedies for violation on [of] this act". No fault is found with the title of the original act.

The complaint is that the sections added by an amendatory act of 1897 (Laws 1897, p. 157), one of which is now Section 11785, were not germane to the subject matter of the original act; and that, inasmuch as the amendatory act of 1897 adopted by reference and without change the title of the original act, the new subject matter thus added is not clearly expressed in its title.

"If the title of an original act is sufficient to embrace the provision contained in an amendatory act, it will be good, and it need not be inquired whether the title to the amendatory act would, of itself, be sufficient." State ex rel. Drainfol. 93a] age District v. Hackmann, 305 Mo. 685, 701, 267 S.W. 608. See also Young v. County of Greene, 342 Mo. 1105, 119 S.W. 2d 369, and cases therein cited.

We, therefore, look to the title of the original act to determine whether the subject matter of the amendatory act is "germane to and within the scope of the general purpose.

of the bill (original act) as declared in its title and which, although not set forth in the particulars expressed in the title, are not out of harmony with them?'. Graves v. Purcell, 337 Mo. 574, 85 SeW. 2d 543, 548. See also Edwards v. Business Men's Assur. Co., 350 Mo. 666, 168 S.W. 2d 82, 83.

Section 11785, by its terms, makes it a crime for an employer to deny its employees the privilege of absenting themselves from their work on election days and a crime to dock their wages if they do. In essence, therefore, the employer who practices the acts condemned by the statute, as did defendant, is guilty of "corrupt practices in elections", which is the first definitive phrase of the original act. We will not further labor the matter. The title of the amendatory act, by its reference to the original, is sufficient.

Finally, it is urged that Section 11785 is in conflict with 11786 and is, therefore, unconstitutional "in that, if defendant should conform with the provisions of Section 11785, it would then necessarily be in violation of Section 11786, R. S. Mo. 1939". We are pointed to no constitutional provision to support the contention, and we find none. The assignment is insufficient to raise the question. State ex rel. Karbe

v. Bader, 336 Mo. 259, 78 S.W. 2d 835.

The contention, however, obviously is without merit. Section 11786 provides: "It shall not be lawful for any corporation " to induce or persuade any employee to vote or refrain from voting for any candidate, or on any question to be determined or at issue at any election. " Section 11785 is directed at the emfol. 941 ployer who refuses to give the employee time to vote or penalizes him if he takes the time. Section 11786 is directed at the employer inducing or persuading the employee how to vote. They are not in conflict.

The judgment of the trial court is affirmed.

Frank Hollingsworth, Judge.

Dalton, Leedy and Tipton, J.J. concur; Hyde, J. dissents in sep. op.; Vandeventer, Special Judge, dissents in sep. op. filed and concurs in sep. op. of Hyde, J.; Conkling, J. dissents and concurs in dissenting opinions of Hyde, J. and Vandeventer, Special Judge.

[fol. 95]

[Title omitted]

## DISSENTING OPINION, HYDE, J.

I respectfully dissent from the ruling that a crime was committed in this case. Strict construction of criminal statutes is a fundamental principle of our law. "Criminal statutes are to be construed strictly: liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. No one is to be made subject to such statutes by implication." (State v. Bartley, 304 Mo. 58, 263 S. W. 95; See also State v. Lloyd, 320 Mo. 236, 7 S. W. (2d) 344; State v. Taylor, 345 Mo. 325, 133 S. W. (2d) 336; State v. Dougharty, 358 Mo. 734, 216 S. W. (2d) 467; Tiffany v. National Bank of Missouri, 85 U, S. 409, 18 Wall, 409, 21 L. Ed. 862.) A defendant should not be held to have committed a crime by any act which is not plainly made an offense by the statute.

The statute in this case, Sec. 129.060, R. S. 1949, is as follows: "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to [fol. 96] any penalty: Provided, However, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum. not exceeding five hundred dollars."

The first sentence states the privilege conferred upon an employee. The second sentence makes it a crime for an employer to refuse to any employee the privilege conferred by the first sentence. Nowhere in the first sentence is it stated that the privilege includes payment by the employer

to the employee for time or activity not covered by the terms of his employment. It only says that he shall not be liable to any penalty. When, as here, the contract (under which the employee agrees to work and under which the employer obligates himself to pay) provides that the employee is to receive \$1.60 per hour for each hour worked, there could be no penalty by not paying him what he has not earned. It is true that the second sentence of the statute makes imposing a "penalty or deduction of wages" en offense, and thereby includes "deduction of wages" in the definition of the ferm "penalty"; but how can there be a "deduction of wages" unless some wages have been searned? It is conceded here that the employee was paid for the full time be had worked on election day and every other day. How can an employee, who is paid in the basis of so much per hour for every hour worked, and who receives pay at the agreed rate for every hour of work actually performed, be subjected to "deduction of wages" by not being paid more? There must first be a right to wages before there can be a deduction of wages, and there is nothing in this statute which creates a right to any wages or [fol. 97] pay beyond that for which the parties have youtracted. Therefore, no duty is imposed on an employer to pay more than is provided for by the contract of employment made by the parties themselves. I think to construe it otherwise would be to make such employers and employment contracts subject to this statute purely by implication, and to me a very far fetched implication at that.

Furthermore, I think to construe this statute as creating a right to wages beyond and in addition to what the parties have agreed upon, would make it unconstitutional as including an additional subject not clearly expressed in the title, in violation of Sec. 23, Art. III of our Constitution. This is a very broad statute; it covers every election of any kind and every kind of employment, agricultural and domestic, as well as industrial. Surely to create such a broad and all inclusive right and obligation as to require any person, who employs another to work and be paid by the hour, to also pay him or any election day for the time he takes to vote (up to four hours) is a new subject to our law and our economy. The purpose of this section of the Constitution

is to prevent the public and the members of the Legislature from being misled as to the contents of a bill. (State ex rel. United Railways Co. v. Wiethaupt, 231 Mo. 449, 133 S. W. 329; State ex inf. Barrett v. Inhoff, 291 Mo. 603, 238 S. W. 122; see also Hunt v. Armour & Co., 345 Mo. 677, 136 S. W. (2d) 312.) The title to this act was: "An Act to Amend an Act Entitled 'An Act to Prevent Corrupt Practices in Elections, to Limit the Expense of Candidates, to Prescribe the Duties of Candidates and Political Committees, and Provide Penalties and Remedies for Violation of This Act,' approved March 31, 1893, by inserting between Sections 4 and 5 three new sections to be known as Sections 420 4b and 4c." (Laws 1897; p. 108.) It seems to me clear that neither this title, nor the title to the original "Corrupt Practices Act" included in it, gave any indication whatever that a new right was being created to obligate every employer to pay wages to anyone employed by him, [fol. 98] for time taken to vote, in addition to the wages and method of work and payment agreed on between them,

It is, of course, highly desirable to include in the corrupt practices act a prohibition against any influence or intimidation of an employee by an employer and certainly also against imposing any penalty or making any deduction of wages actually earned and due under the contract between them. It is equally important to safeguard the employee's right of franchise by requiring his employer to allow him time to vote; and to make a violation of such obligations by the employer a criminal offense. An employee, whose contract is to be paid by the month or year, has, of course, earned his pay even though he has taken off from his duties some time to vote or for other personal purposes. It would certainly be a violation of the employment contract, as well as a corrupt practice, for an employer to hold out part of compensation earned, under such eircumstances. However, the matter of time of service and method of compensation is a matter of centract, at least until the State steps in to regulate it, and certainly when the State does decide to do so (by fixing maximum hours, minimum hours or requiring pay for an outside activity) that is a separate and, distinct subject from election laws or corrupt election practices.

Laurance M. Hyde, Judge.

Conkling, J. and Vandeventer, Spec. J., Concur.

[fol. 99] DISSENTING OPINION-VANDEVENTER, J.

In addition to the reasons given by Judge Hyde in his dissenting opinion, in which I concur, I think this cause should be reversed because that part of Sec. 11,785 upon which this conviction is based conflicts with the State and Federal Constitutions. I believe that section (now Sec. 129.060 R. S. Mo. 1949) is unconstitutional in so far as it makes it a crime for an employer to deduct from the pay of his employee the amount of time lost by the employee in absenting himself on election day. In my judgment, it violates the provisions of both the state and federal constitutions which forbid the taking of property without due process of law, and guarantees to every citizen the equal protection of the law. (Am. XIV Const. U. S. Sec. 1., Art. 1, Sec. 10, Const. Mo. 1945) The statute in question is as follows:

"Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is them engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting [fol/100] himself, be liable to any penalty: Provided, However, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."
(Italics mine.)

A careful reading of this statute demonstrates that its main purpose was to allow every employed citizen to absent himself from his labor on election days long enough to cast his ballot. There is nothing in this statute that requires him to vote, although he may demand four hours relief be tween the opening and closing of the polls. The part that I think is unconstitutional is that part which condemns the employer if he deducts any of the employee's wages. Really, it isn't a deduction of wages for the employee has rendered no services for which he should be paid. The statute apparently means that if the employer fails to pay the employee for work that he does not do during the usual working hours when the employee is absent, the employer? is deemed guilty of a misdemeanor. He is guilty, according to the statute, if he "shall cause any employee to suffer any \* \* \* deduction of wages because of the exercise of such privilege, \* . \* ." The privilege given by the words of the statute is not the privilege of voting but it is the privilege of absenting himself for four hours between the opening and closing of the polls. Whether reference to the privilege or duty of voting was left out deliberately and designedly, we have no way of knowing, but clearly under [fol. 101] the statute, the employer could be punished for deducting any wages of the employee during the time he has absented himself, whether he voted or not. However, if the statute did specifically say that the employee must vote, if he takes the time off, I am still of the opinion that it attempts to take property of the employer without due process of law, and denies him the equal protection of the

Due process of law, when referring to legislation, has been defined as follows:

"As applied to legislation, due process of law means statutes that are general in operation and affect the rights of all alike." (16 C. J. S. Constitutional Law, Sec. 567 (c), Page 1145.)

It does not mean merely an act of the legislature, for such a construction would abrogate all restrictions on legislative power. Pauly vs. Keebler, 185 N. W. 554, 175 Wis. 428.

There are decisions that hold squarely under a statute almost identical with this one that it is violative of these constitutional guarantees. Those cases are: People vs. Chicago M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610. McAlpine vs. Dimick, 157 N. E. 235, 326 Ill. 245. International Shoe Co. vs. Caldwell, 204 S. W. (2) 973, 305 Ky. 632, Cer. den. 92 L. Ed. 1767, 334 U. S. 843, 68 S. Ct. 1511.

Division One says in its opinion:

"It is apparent that Section 11785 is violative of the due process clauses of both the Federal and State Constitutions unless its enactment is within the police power of the State."

So if it can be justified at all, it mast be based on the valid exercise of the police power. I recognize that while "police power" cannot be definitely and briefly defined in [fol. 102] such a way as to embrace all sets of facts that might face the courts, yet a general definition is epitomized in C. J. S. as follows:

of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits." (16 C. J. S. Constitutional Law, Sec. 174.)

If Section 11785 (129.060 R. S. Mo. 1949) is to be held within the police power, it certainly would be under "morals" or "the general welfare of society." But section 196 of C. J. S. Constitutional Law, tersely states "The exercise of the police power is subordinate to constitutional limitations thereon."

So far as we have been cited, or I have been able to find from an independent investigation, the first and leading case in the United States directly on this question is the case of People of the State of Illinois vs. Chicago, Milwaukee and St. Paul Railway Co., 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610. An annotation at the end of that case in A. L. R. confirms my opinion that it is a case of first impression. In that case the Supreme Court of Illinois had under consideration a statute almost identical with the one before us except it permitted the employee two hours absence instead of four. That Court said:

"Under our state and Federal Constitutions every. person is guaranteed the equal protection of the law in the right to own use, and enjoy property. These Con-. stitutions also distinctly provide that the property of no person shall be taken unless compensation be given to him for such invasion of his rights. Any law that deprives any person of his property or compels him to a deliver to any person his property without justification deprives him of property without due process of law. The section of the statutes above quoted violates the provision of our Constitution aforesaid by providing, in substance, that no deduction from the usual salary or wages of the employee shall be made by his employer on account of such absence, and by subjecting the employer to the penalty aforesaid in case he' makes such deduction from the employee's wages. There is no justification or sound reason to be found in the law for making such a discrimination between [fol. 103] an employer of labor and other persons who do not employ labor, and it likewise is a clear violation of the due process clause of the 14th Amendment to the Federal Constitution, The legislative branches of this government and of this state have gone to the utmost limits in legislation to protect the lives, health, and safety of employees, and the courts of this country, including this court, have also gone far in sustaining those laws wherever and whenever it reasonably appeared that such laws were necessary or beneficial in protecting the lives, health, and safety of such employees while at work, without regard to the question of cost to employers. The same courts have gone equally far in sustaining laws that guarantee the equal and untrammeled right of every citizen to exercise his right of franchise and to cast his vote at every election as he pleases and for whom he pleases, and without

hindrance or undue influence of any kind by any person; but, so far as we know, no court has ever decided in any case that it was the right of any citizen, under any circumstances, to be paid for the privilege of exercising his right to vote, or to be paid by his employer for the time employed by him in the exercise of his right to vote. The statute in this case, in substance, requires employers of laborers to pay them for two hours' time while exercising their right to vote, and thus deprives such employers of their money and property without due process of law, and thereby denies them the equal protection of the laws, in violation of both the Federal and State Constitutions."

The State of Illinois in this case argued, as is argued here, that this statute was a valid exercise of the police power but that contention was considered by the court and it said:

"It is true that-the state does have the right, under its police powers, to pass laws that tend to promote the health, safety, or morals of such employees as Turney, because of the fact that such laws would tend to promote the health, comfort, safety, and welfare of society. The act in question, as contended by plaintiff in error, does not in any way, so far as we are able to [fol. 104] see, tend to promote the health, safety, or morals of such employees. The provisions in question are not adapted to the object for which the law was enacted, and cannot be said to secure public comfort, welfare, safety, or public morals. There is no contention, and there can be none made with any reasonable showing, that the provision in question tends to promote the safety or health of any employee. It has always been the policy of our laws to condemn the idea of any voter being paid for exercising the privilege of an elector or voter. The right to vote is simply one of the privileges guaranteed to every citizen of this country who possesses the requisite qualifications. It is not only a right but should be regarded as a duty of the citizen, where he is reasonably able physically to perform that duty. It is not the constitutional right

of any citizen to be paid for the exercise of his right to vote, and the holding of the provision of the statute void does not violate the right of any citizen, including those who are employed to labor. This provision of the statute is not sustainable under the police power of the state, and it does violate the constitutional provisions aforesaid, and therefore must be declared void. Besides, 'no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection' of the laws, and it should not 'override the demands of natural justice.'

In the case of McAlpine vs. Dimick, 326 Hl. 245, 157 N. E. 235, the question was again before the Supreme Court of Illinois and that court reaffirmed its doctrine in People vs. Chicago, Mil. & St. Paul Railway Co., Supra, saying:

"The provision of section 7, giving employees the right to absent themselves from their employment for two hours on election day for the purpose of voting without any deduction from their salaries or wages on account of such absence is also unconstitutional, being a violation of section 2, article 2 of the Constitution."

If it was unconstitutional then, it is now. The Constitutional provision and the statute remain the same. A valid [fok 105] exercise of the police power cannot transcend the Constitution.

In Zeiney vs. Murphy, 387 Ill. 492. 56 N.E. (2) 754, which was a suit for unemployment compensation, the court mentioned the case of People vs. Chicago, Milwankee and St. Paul R. R. Co. and said!

"The statute there, as questioned, provided a penalty for any employer who made a doduction in wages for a period of two hours used by such employee in voting at any general or special election and the court held that it was not the constitutional right of any citizen to be paid for the time consumed in exercising the right to vote. The court further said: 'No exercise of the police power can disregard the constitutional guaranties in

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respect to the taking of private property, due process and equal protection of the laws. This holding was approved in McAdpine v. Dimick, 326 Ill. 240, 157 N.E. 235. However, this statue, re-enacted and amended from time to time, still contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."

The fact that the statute has been re-enacted and amended, placed and maintained, on the statute books and apparently never enforced, does not make it constitutional. The statute in this state was enacted more than 50 years ago and the fact that there are no decisions on it until now does not inforentially or otherwise tend to prove its constitutionality. More likely it proves that there has vever been any attempt to enforce it. The case at bar seems to be the first one, as far as the books show, where this State has endeavored to punish an employer for refusing to pay an employee under these circumstances. And I can find no attempt on the part of any employee to collect such, as it appears to me, unrighteous compensation. I had rather believe that absence of precedent is due to the fact that the workers of Missouri have resented the legislative implica-[fol. 106] tion that they will not exercise that privilege of free men without being paid for it. I had rather think that in their scales the right to vote outweighs a few hours pay.

In Illinois Central Railway Company vs. Commonwealth, 305 Ky. 632, 204 S.W.(2) 973, the same question was up and that court held it unconstitutional both under the Kentucky Constitution and the Constitution of the United States. As I read that opinion, it did not base its decision upon the People vs. Chicago, Milwaukee, St. P. R. Co. Supra, but after it had discussed the statute, its reasons for holding it unconstitutional, and then declaring its unconstitutionality under the Kentucky Constitution, it said this:

"We also believe that the wage-payment-for-votingtime provisions of this statute are antagonistic to the

United States Constitution, particularly that provision which says that no state shall deprive any person of his property without due process of law or deny to any person in its jurisdiction the equal protection of the law.

"So far as we know, there has been only one case of this exact character decided by any court of last resort in the United States, The holding of that case was that such a law as this one now under consideration, passed by legislative authority in the State of Illinois, could not meet constitutional standards and must accordingly fall in the face of the fundamental restrictions of organic law. See People v. Chicago, M. & St. Paul Ry. Co., 306 Ill. 486, 138 N.E. 155, 28 A.L.R. 610."

It seems to me that this question here boils itself down to this proposition, can the legislature, without violating the provisions of the Constitutions, compel an employer to pay wages to his or its employee for four hours, or any other amount of time, that he absents himself on election day and for which he gives his employer no service?

It is the duty of every good citizen to vote. On that day, and only then, he stands equal with every other citizen. Of course, the employer should not be permitted to deprive him of this duty by refusing to let him leave the place of his [fol. 107] employment. To penalize him if he does is certainly a valid exercise of the police power and promotes the general welfare of the country in increasing the number of voters and thereby make the questions to be determined at the polls represent the voices of a greater number. to require the employer to pay him while absenting himself on election day (or for going to the polls to vote although the statute does not require that) does not promote the morals of the citizens but in my judgment, has the opposite effect. To pay a voter for going to the polls to vote is the first step toward corruptly influencing him to vote a certain way.

What benefit does the employer receive by the employee voting that is different to the benefit that the voter himself receives or any third person interested in a fair expression of opinion at the polls? He benefits no more than anyone else, including the employee. It certainly does not indicate

high morals on the part of a citizen to abstain from going to the polls unless somebody pays him, or unless he can do so without losing a small amount of wages. As a matter of fact, this employee, as most employees in this modern age of the eight hour day, had plenty of time either before going to work or after quitting time to cast his ballot without interrupting his service to his employer.

All good citizens should exercise the privilege of voting. It should be exercised voluntarily without any strings attached. He should desire on this day to be equal with all other citizens without any influence from any source except his own considered judgment of the candidates to be selected or the issues to be decided. If he receives pay for yoting, he must feel a certain sense of obligation to the payor. It has always been the policy of a democracy to condemn the hiring of people to yote, to the end that the manner of marking their ballot would not be corruptly influences.

It might be argued that it would be for "the general welfare" and foster more amicable relations between the employer and employee, if the statute is followed and the employer pays the employee. Such a feeling could be based only upon a sense of obligation which would restrict the free exercise of the right to vote according to one's owr lights.

[fol. 108] But it is more likely that the employee, so paid, would not attribute this benefaction to his employer but the enforcement of the statute would transmute loyalty to the employer into gratitude to the legislature. In either event, the result would not be beneficial to the general welfare.

It will be noted that this statute does not apply to certain elections, it applies to the elections and the only requirement is that it be an election in which the employee is "entitled to vote". The sole object of the Corrupt Practice Acts of the various states and nation is to procure a free expression in the voting booth. The voter should go there voluntarily and in theory, at least, express his honest convictions on the candidates and issues. He should not go there as the hired hand of his master on the time that his master is compelled to pay for, in exercising his privileges as a citizen. To require his employer to pay him for voting or pay him for the absenting of himself from his job, so he may vote is, in

my opinion, immoral in itself and at variance with this country's policy of free and unhampered elections. The general welfare of the state will be best conserved if the voter exercises his right to vote on his own time uninfluenced by the feeling that he is an employee in his master's service and on the payroll at the time he is doing that which he should only do as a citizen. This privilege should not be measured in dollars.

There are also cases which seem to hold that such statutes are justified as a valid exercise of police power. They are: People vs. Ford Motor Co. 271 App. Div. 141, 63 N.Y.S. (2) 697. Kouff vs. Bethlehem-Alameda Shipyard, Inc. (Cal. App.) 202 Pac. (2) 1059. Lee vs. Ideal Roller & Mfg. Co. 92 N.Y.S. (2) 276. Ballarina vs. Schlage Lock Co. (Cal.) 226 Pac. (2) 771.

The cases to the contrary in my opinion are not as well reasoned and logical as the ones above referred to.

In People vs. Ford Moter Co., 271 App. Div. 141, 63 N.Y.S. (2) 697, the Company was convicted and fined \$100.00 on each of three counts for subjecting employees to a reduction of wages because of absence from work, while exercising the privilege of attending an election.

The majority opinion did not discuss the constitutionality [fol. 109] of the statutes. It was discussed, however in a lengthy and well reasoned dissenting opinion by Lawrence, J., and at the close of that opinion, he said:

"So far as any case has been brought to my attention and so far as I have been able to discover, no court has decided that it is the right of any voter, under all circumstances, to be paid for the privilege of voting. The statute here requires employers to pay their employees for two hours of time while exercising the right to vote, whether that is necessary or not, and thus deprives them of their property without due process and denies them the equal protection of the law, in violation of both the federal and state constitutions."

In Kouff vs/Bethlehem-Alameda Shipyard, Inc. (Cal. App.) 202 Pac. (2) 1059, the question before the court was the legality of the discharge of an employee because he had taken off time to serve as an officer of election on election

day. It was held that the statutory requirement was not unconstitutional. The court cited and discussed People vs. Chicago, M. & St. Paul R. Co. supra and Illinois Central R. vs. Commonwealth, supra and said:

"It is interesting to note that both cases concede that that part of the statute requiring employers to allow time out to vote—2 hours in Illinois and 4 in Kentucky -is a proper exercise of power. It was for a violation of the part requiring full pay that both railroads were prosecuted. Although those cases deal with time out for voting, while this deals with time out for electionboard service, there is no essential difference between the statutory language in those cases and that of section 696 viz., 'nor shall any deduction be made from his usual salary or wages.' However, it is not necessary for us to express any opinion as to the constitutionality of the part of section 695 just quoted. It suffices to say that it is clearly separable from the dismissal provision. See 12 Ca. Jur. PP. 643, 644. If the state can prevent employers from discharging employees becarse they serve on election boards, it follows that the complaint state a cause of action for unlawful discharge."

[fol. 110] In the case of Lee et al vs. Ideal Roller & Mfg. Co. 92 N.Y.S. (2) 276; the cause was tried in the municipal court, Scileppi, Justice, presiding. The facts in that case were dissimilar to the one here. In that case an employee had worked 38 yours in a week and had been paid for 40 hours because of two hours off on election day. He was then called upon to work 4 more hours or Saturday after he had only worked 38 hours but had been paid for 40. Under a Union contract for overtime above a 40 hour week, he was to receive time and one half. He contended that the two hours for which he was paid and did not work should be counted in the 40 hour week so he could get time and one-half for the full four hours worked on Saturday. His employer contended otherwise but Scileppi, Justice, held for the employee and rendered judgment against the defendant for the 4 hours worked on Saturday at overtime wages. No case is cited in the opinion as authority, no constitutional

question was discussed and the only issue was whether to count the two hours that were paid for that were not worked in the 40 hour week so the full four hours on Saturday would be paid at the overtime rate. In its opinion, Scileppi, Justice, said:

"It is conceded by the defendant that if the plaintiffs had actually worked eight hours on Election Day, with two additional hours off to vate, the plaintiffs would be entitled to two hours pay at overtime rate for that day."

This case is therefore not in point here. In Ballarina vs. Schlage Lock Co. 226 Pac. (2) 751, the Appellate Department, Superior Court, City and County of San Francisco, California was considering a statute in all essentials the same as ours. This statute had been enacted in 1881 and until November, 1950 had never been before the courts. It permitted every voter at every general, direct primary or presidential primary election to be absent from his employment for two consecutive hours between the time of opening and the time of closing the polls. It provided that he should not be liable to any penalty "nor shall any deduction be made on account of any such absence from his usual salary or wages." This case never pretended to separate the two elements of the statute that is, the right to be absent and the right to be paid. It merely stated that [fol. 111] when persons enter into a contract, all material statutes affecting it are read into the contract by the law. That, in the abstract, is a true statement but it has this exception, that it does not apply to an unconstitutional statute or part of one. The court then held that this statute taken as a whole was a valid exercise of police power and became a part of every contract entered into between employer and employee after its enactment.

I am not much impressed with the argument of appellant about the liss of production. When it entered into its contract with the employee, whether actually written into it or not, that contract included the provisions of all valid material statutes. 17 C. J. S. Contracts, Sec. 330. When it contracted with its employee, it knew that on election days he was entitled to a leave of absence for four hours between

the hours of opening and closing of the polls. In my judgment, that provision went into the contract, was a part of it, was a valid exercise of the police power and any loss occasioned by it because of the non-productivity of its plant was nothing about which it could complain. But to take money from the pocket of the employer whether it be \$2.40 for an hour and one-half or the same sum multiplied by the number of its employees, is taking the property of one segment of society and giving it to another without anything in return and this without considering the immoral aspect of paying an employee for exercising his privilege and duty to vote. That part of the statute was unconstitutional and did not become a binding part of the contract. People vs. Coler, 59 N. E. 716, 166 N. Y. 1, 82 Am. S. R. 605, 52 L. R. A. 814, Affirmed, 67 N. Y. S. 701, 56 App. Div. 98; Cleveland vs. Clements Bros. Const. Co., 65 N. E. 885, 67 Ohio St. 197, 93 Am. S. R. 670, 59 L. R. A. 775.

In the case written by the £: Louis Court of Appeals (State vs. Day-Brite Lighting, Inc., 220 S. W. (2) 782), it was merely held, as to the matter now in question before this court, that the information charged an offense under the statute. It construed the statute as it found i, and did not pretend to pass (as indeed it could not) upon its constitutionality. I have no disagreement with its holding that the right for an employee to absent himself from his employment, and the penalizing of an employer if he prevented [fol. 112] him from the "exercise of such privilege," is within the valid exercise of the police power of the state.

An employer is deprived of his property without due process of law and denied the equal protection of the laws if he is compelled to pay wages during the absent period, where no services for the employer is performed and where the period of absence is for the benefit and convenience of the employee. Such a violation of an employer's rights cannot be hallowed by the police power.

William L. Vandeventer, Judge.

Conkling, J., concurs.

[fol. 113] IN SUPREME COURT OF MISSOURI

## . [Title omitted]

MINUTE ENTRY OF FILING MOTION FOR REHEARING-June 26,

Comes now the appellant, by attorney, and files herein a motion for rehearing and suggestions in support, with service, in the above entitled cause.

# IN SUPREME COURT OF MISSOURI

## [Title omitted]

ORDER OVERECLING MOTION FOR REHEARING July 9, 1951

Now at this day, the court having seen and fully considered appellant's motion for a rehearing in the above entitled cause, doth order that said motion be, and the same is hereby overruled.

## IN SUPREME COURT OF MISSOURI

## [Title omitted]

# ORDER STAYING MANDATE-July 21, 1951

Comes now the appellant, by attorney, and files and presents to the court its motion to stay the mandate in the above entitled cause, which motion is considered by the court and sustained.

[fol. 114]

[File endorsement omitted]

IN SUPREME COURT OF MISSOURI

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI TO THE SUPREME COURT OF THE UNITED STATES
—Filed August 14, 1951

To the Chief Justice of the Supreme Court of The State of Missouri:

The Day Brite Lighting, Inc., your petitioner, respect-

1. Petitioner is the Appellant in the above entitled cause.

2. The State of Missouri, the above named Appellee, filed an information in the St. Louis Court of Criminal Correction. St. Louis, Missouri, on the 25th day of June, 1947. The information charged your petitioner with the commission of a misdemeanor, a criminal offense, to wit:

"That the Day Brite Lighting, Inc., a corporation, oin the City of St. Louis, on the 5th day of November, 1946, being a day set aside for the holding of an election in said City, and State, and being then and there the employer of Fred C. Grotemeyer, who was a person entitled to yote at said election, and who was entitled to absent kimself from his work and employment for a period of four hours between the times of opening and closing of the polls without penalty of deduction of wages because of the exercise of such privilege, did wilfully and unlawfully penalize the said Fred C. Grotemeyer, their employee, by deducting from his salary the amount of his earnings for the time he was absent from his work, in the exercise of such privilege, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.'

[fol. 115] 3. Your petitioner was found guilty at a trial held on the 20th day of November, 1949, and on the 2nd day of December, 1949, it was sentenced to pay to the Respondent a fine of One Hundred Dellars and costs.

4. An appeal from this judgment and sentence was taken by your petitioner, and said judgment and sentence was affirmed by Division I of the Supreme Court of Missouri on November 13, 1950. A motion for rehearing or, in the alternative, to transfer the cause to the Supreme Court en banc because of the Federal Constitutional Question involved was duly filed, and Division I of the Supreme Court of Missouri, while overruling the motion for a rehearing, did transfer the cause to the Court en banc.

5. The Supreme Court of Missouri en banc, by a 4 to 3 decision, on the 11th day of June, 1951, adopted the opinion of Division I of the Supreme Court of Missouri, thereby upholding the validity of that section of the statutes of the State of Missouri under which your petitioner was convicted and which section your petitioner has alleged and now alleges is repugnant to the Constitution of the United States; and thereafter your petitioner duly applied for a rehearing which was denied by the Supreme Court of Missouri en banc on the 9th day of July, 1954.

6. Your petitioner respectfully states by this petition and as is shown by the assignment of errors filed herewith, that in said cause there is drawn in question the validity of a statute of the State of Missouri, namely, Section 129.060, R. S. Mo. 1949, on the ground of said statute being repugnant to the Constitution of the United States in that this petitioner's conviction under the provisions of said Section 129.060, R. S. Mo. 1949 deprives this petitioner of its property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United [fol. 116] States, denies this petitioner of equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and impairs the obligation of contract in violation of Section 10, Article I of the Constitution of the United States, and the decision is in favor of its validity.

7. Your petitioner further respectfully states by this petition and as is shown by the assignment of errors filed here-

with that in said cause there is additionally drawn in question the validity of a statute of the State of Missouri, namely, Section 129.060 R. S. Mo. 1949, on the ground of such statute being repugnant to the Constitution of the United States in that this petitioner's conviction deprived it of its property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States, when all of the facts alleged in the information filed in this case and based on the provisions of said Section 129.060 R. S. Mo. 1949 were not sufficient to accuse or convict this petitioner of the commission of any crime; and, when all the facts stipulated in evidence and before the Court showed this appellant had not violated the provisions of said statute, the conviction of this appellant deprived it of its property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States; and, when the facts alleged in the information filed in this case, which was based on said Section 129.060 R. S. Mo. 1949, were not sufficient to accuse and convict this appellant of the commission of anyon crime, the conviction of this appellant denied it the equal protection of the laws contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and, wher all of the facts stipulated in evidence and before the Court showed that the appellant had not violated the provisions of Section 129.060 R. S. Me. 1949, the conviction of the appellant denied it the equal [fol. 117] protection of the laws contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision aforesaid is in favor of the validity of said section. / -

8. Your petitioner avers that Section 129.060 R. S. Mo. 1949 has not expired by its own limitation and has not been

altered or repealed by law.

9. Your petitioner, therefore, desires to avail itself of the law in such case made and provided by appeal to the Supreme Court of the United States.

Wherefore, this petitioner prays for an allowance of an appeal from said Supreme Court of the State of Missouri to the Supreme Court of the United States and for such other and further process and proceedings as will enable it to

9.

obtain a review of the case by the Supreme Court of the United States and a reversal of the decision of the Supreme Court of Missouri, and also prays that an order be made fixing the amount of security which petitioner, as Appellant, shell give and furnish upon said appeal; and that upon the giving of said security, all further proceedings in this Court be suspended and stayed until the determination of said appeal by the Supreme Court of the United States; and that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Missouri, may be sent to the Supreme Court of the United States, as provided by law.

Louis J. Portner, 509 Olive Street, St. Louis, Missouri, Cobbs, Blake, Armstrong, Teasdale & Roos, Thomas H. Cobbs, Robert E. Blake, Henry C. M. Lamkin, 500 Olive Street, St. Louis, Missouri, by Menry C. M. Lamkin, Attorneys for Petitioner and proposed Appellant.

[fols. 118-119] Bond on appeal for \$500.00 approved and filed August 14, 1951 omitted in printing.

[fol. 120]

[File endorsement omitted] o

IN THE SUPREME COURT OF MISSOURI

### [Title omitted]

Assignment of Errors-Filed August 14, 1951

Comes now the said Day-Brite Lighting, Inc., Appellant, and in compliance with Rule 9 of the Rules of the Supreme Court of the United States, assigns the following errors in the record and proceedings in the said case:

1. In said suit there was drawn in question the validity of a Statute of the State of Missouri numbered 11785 R. S. Mo. 1939, Vol. II, page 3071, (the said section being then and there parts of an Act known as the "Corrupt Practices

in Election Act" and the particular sub-section, namely, Section 11785 R. S. Mo. 1939, being entitled "Employees to be allowed four hours (to vote) penalty, etc.", approved in 1897), on the grounds that it was repugnant to the Constitution of the United States and specifically Article I of the Fourteenth Amendment thereto, Section 19, Article I of said Constitution, and the Fifth Amendment thereto, and the decision of the Supreme Court of the State of Missouri was in favor of the validity of said Statute, which decision is hereby assigned as error. (The statute, under the revision of 1949, is now Section 129,060 R. S. Mo. 1949, Vol. 1, page 1253, and the Act is now known as the "Corrupt Practices and Offenses Relating to Registration and Elections". [fol. 121] The Statute in question, however, was not changed by the revision. The 1949 citation will be used herein hereafter.)

and deciding that forcing an employer to give to an hourly paid employee money for time not worked during his regularly scheduled work day, but time used by the employee so that the said employee would have the statutory four hour period during the time the polls were open in which to vote, was not a deprivation of Appellant's property without due, process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Missouri erred in holding and deciding that forcing one class of persons, natural or corporate, to pay a member of one special group of the electorate of the State of Missouri and of the United States, for time missed from his regular employment in order to vote, did not deny this Appellant equal protection of the law contrary to Section 1 of the Fourteenth Amendment of the United States.

4. The Supreme Court of Missouri erred in finding and holding that forcing one party to a contract to pay to the other party to a contract the hourly rate contractually agreed on between the parties to be paid for each hour the second party worked, even though the second party did not do any work during the period in question, was not an abrogation of the obligation of contracts in contravention of

Section 10 of Article I of the Constitution of the United States.

- 5. The Supreme Court of Missouri erred in holding and deciding that the Day-Brite Lighting, Inc. was guilty of violation of the provisions of Section 129.060 R. S. Mo. 1949 when the acts of this Appellant alleged in the information filed in this cause did not constitute a violation of any [fol. f22] section of the laws of the State of Missouri, and in particular Section 129.060 R. S. Mo. 1949, and hence this Appellant by such conviction was deprived of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.
- 6. The Supreme Court of Missouri erred in holding and deciding that the Day-Brite Lighting, Inc. was guilty of violation of the provisions of Section 129.060 R. S. Mo. 1949, when all the evidence produced at the trial did not show any violation of said section, and hence this Appellant by such conviction was deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.
- 7. The Supreme Court of Missouri erred in holding and deciding that the information filed in this case and based on Section 129.060 R. S. Mo. 1949 contained facts sufficient to charge this Appellant with the commission of a crime, and hence this Appellant was denied the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.
- 8. The Supreme Court of Missouri erred in holding and deciding that The Day-Brite Lighting, Inc. was guilty of the violation of the provisions of Section 129.060 R. S. Mo. 1949, when all the evidence produced at the trial did not show any violation of said section, and hence this Appellant by such conviction was denied equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, on account of the errors herein bove assigned defendant appellant prays that the judgment of the Supreme Court of Missouri, dated the 11th day of June, 1951 in the above entitled cause, be reversed, and judgment be

entered in favor of this Appellant, and for such other relief [fols. 123-184] as to the Court may seem just and proper.

Dated this fourteenth day of August, 1951.

Louis J. Portner, 509 Olive Street, St. Louis, Missouri, Cobbs, Blake, Armstrong, Teasdale & Roos, Thomas H. Cobbs, Robert E. Blake, Henry C. M. Lamkin, 506 Olive Street, St. Louis, Missouri, by Henry C. M. Lamkin, Attorneys for Appellant.

[fols. 135-136] Citation in usual form showing service on J. E. Taylor emitted in printing.

[fol. 137] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL-Filed August 14, 1951

The octition of Day-Brite Lighting, Inc., de'endant and appellant in the above entitled cause for an appeal in the above cause to the Supreme Court of the United States, from the judgment of the Supreme Court of the State of Missouri, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that the appeal be and is hereby allowed to the Supreme Court of the United States from the final judgment dated the 11th day of June, 1951 (Motion for Rehearing overruled the 9th day of July, 1951), of the Supreme Court of the State of Missouri, as prayed in said petition, and that the Clerk of the Supreme Court in the State of Missouri shall, within 40 days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of this Court, a true copy of the material parts of the record herein, which shall be designated

by praccipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the

Supreme Court of the United States.

[fol. 138]: It is further ordered that the said Appellant shall give a good and sufficient cost bond in the sum of Five Hundred Dollars (\$500.00), that said Appellant shall prosecute such appeal to effect and answer all costs if it fails to make his plea good, and that said bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceeding in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated this 14th day of August, 1951.

Roscoe P. Conkling, Acting Chief Justice of the Supreme Court of the State of Missouri.

[fol. 139] Acknowledgment of Service (omitted in printing)

[fol. 140] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 141-143] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

### [Title omitted]

Points to Be Relied Upon and Designation of Parts of the Record to Be Printed—Filed October 15, 1951

Comes now Day Brite Lighting, Inc., the above appellant, and, pursuant to Supreme Court Rule 12, Paragraph 9, adopts its Assignments of Error as its statement of Points to be Relied Upon and represents that the whole of the Record, as filed, is necessary for the consideration of the case, except the Appeal Boad.

Appellant states that a simple statement to the following effect: "Appellant filed an appeal bond in proper form and

the same was approved on August 14, 1951" will suffice in respect to the appeal bond.

Louis J. Portner, 509 Olive Street, St. Louis, Missouri; Robert E. Blake, Wm. H. Armstrong, Heary C. M. Lamkin, 506 Olive Street, St. Louis, Missouri; by Wm. H. Armstrong, Attorneys for Appellant.

Statement of Service (Omitted in Printing)

[fol. 144] Supreme Court of the United States, October Term, 1951

[Title omitted]

Onone-November 5, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

(8680)

Office Supreme Color, U. S.

SEP 12 1351

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 317

THE DAY-BRITE LIGHTING, INC.,

Appellant,

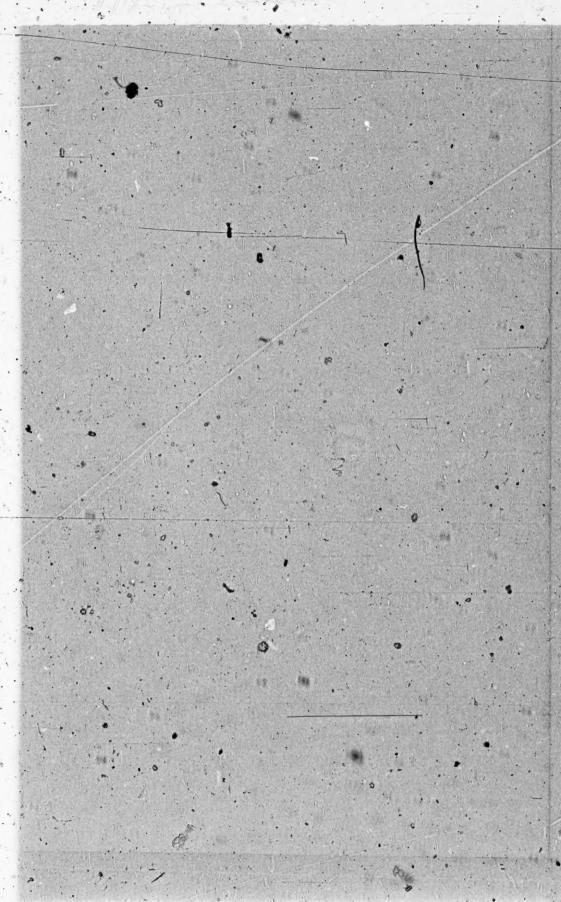
STATE OF MISSOURI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT AS TO JURISDICTION

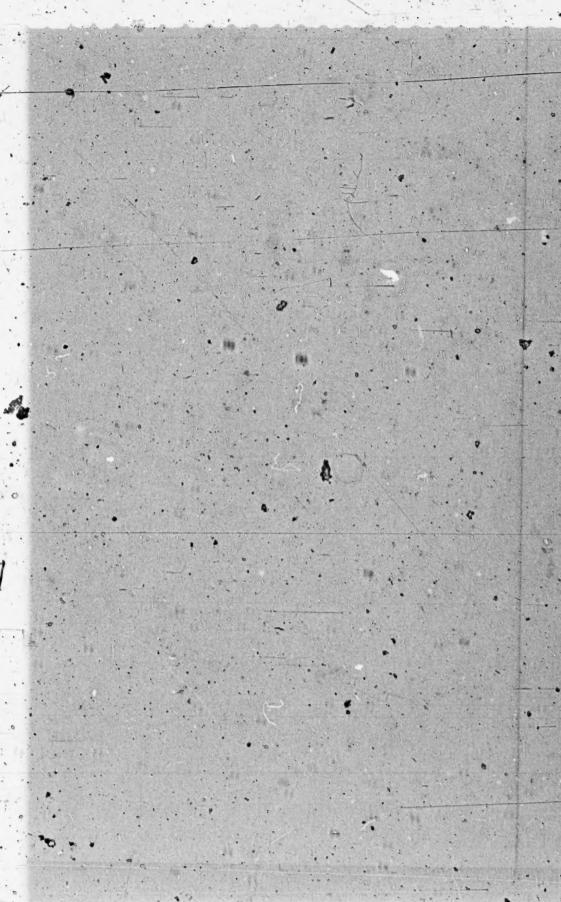
LOUIS J. PORTNER,
THOMAS H. CORRS.
ROBERT E. BLANK,
HENRY C. M. LANKIN,
Counsel for Appellant.

CORBE, BLAKE, ARMSTRONO, TEAR ALE & BOOS, Of Counsel.



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	BASE CONTRACTOR



## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

# No. 317

STATE OF MISSOURI,

Appellee,

US.

THE DAY-BRITE LIGHTING, INC.,

Appellant

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, Paragraph 1, Day-Brite Lighting, Inc., the above Appellant, files this, its statement particularly disclosing the basis on which said Appellant contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is Section 1257(2); Title 28 United States Code Annotated, Chapter 646, Public Law 773, which provides that final judgments rendered by the highest Court of a state in which a decision could be had pay be reviewed by the Supreme

Court of the United States by appeal where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

II. The statute of the State of Missouri whose validity is here involved is Section 129,060 R. S. Mo. 1949, Vel. 1, page 1253 (at the time of the commencement of the cause here involved the section was 11785 R.S. Mo. 1939, Vol. 2, page 3071 but the statute was not changed by the revision), which reads as follows:

... 'Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty; provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby confe red or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

III. The judgment appealed from was entered by the Supreme Court of Missouri en banc on the 11th day of June, 1951 as appears from page 80 of the certified unprinted record of this cause on file with the Clerk of the Supreme Court. (The page numbers of the printed record cannot here be inserted herein since the record has not yet been printed.) The motion for a rehearing was denied by the

Supreme Court of Missouri en banc on the 9th day of July, 1951 as appears on page 113 of the said certified unprinted record.

IV. The application for an appeal was presented and approved on the 14th day of August, 1951, as appears from page 138 of the certified unprinted record on file with the Clerk of the Supreme Court.

V. The appeal herein is from a judgment of the Supreme Court of Missouri in a criminal case at law, which upheld the conviction of the Appellant of a violation of Section 129,060 R. S. Mo. 1949, supra. The gist of the offense involved was the Aphant's failure to pay an employee working at an hourly rate the amount of compensation he would have earned had he worked his full normally scheduled work day. The employee took one hour and a half from his normally scheduled work day in order to secure the statutory four consecutive hours in which to vote, and the Appellant refused to pay him for the hour and a half in which he was absent from work and performed no services. The validity of this section and the validity of the conviction of the Appellant under this section is drawn into question on the ground of the said statute and the Appellant's conviction thereunder being repugnant to the Constitution of the United States, as is more particularly berein set out and as appears from the assignment of errors found on pages 120, 121, 122 & 123 of the said certified unprinted . record on file with the Clerk of the Supreme Court. page numbers of the printed record are not available for inclusion herein.) The appeal herein sought is for the purpose of reversing the judgment of the Supreme Court of Missouri upholding the conviction of this Appellant, the entry of a judgment discharging this Appellant and for such other relief as the Court may deem meet and proper.

VI. The grounds upon hich it is contended the questions involved are substantial are:

- 1. The judgment of the Supreme Court of Missouri in this case deprived this Appellant of its property without due process of law by forcing this Appellant to pay an employee for time not worked and for time during which the employee did nothing to earn compensation, and hence the decision is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.
  - 2. The judgment of the Supreme Court of Missouri deprived this Appellant of equal protection of the laws by forcing the Appellant to pay to one of a special group of the electorate, namely, employees, compensation not earned by the said employee, so that the said employee could exercise his privilege and duty to vote, and hence the decision is repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.
  - 3. The judgment of the Supreme Court of Missouri upheld a law of the State of Missouri that abrogated the obligation of contracts by forcing this Appellant to pay to a second party, namely, one of its employees, compensation for time not worked when the contract between the parties was to the effect that the said second party should only be paid for time worked, and the decision hence is repugnant to previsions of Section 10 of Article I of the Constitution of the United States.
  - 4. The judgment of the Supreme Court of Missouri found this Appellant guilty of a violation of the provisions of Section 129.060 R. S. Mo. 1949 when the facts alleged in the information filed in this cause and against this Appellant were not sufficient to convict this Appellant of the commission of any crime, and hence this Appellant was convicted without due process of law, and such conviction deprives it of its property without due process of law con-

trary to the provisions of the Fifth Amendment to the Constitution of the United States.

5. The judgment of the Supreme Court of Missouri found this Appellant guilty of a violation of the provisions of Section 129.060 R. S. Mo. 1949, when all the facts stipulated in evidence and before the Court showed that this Appellant had not violated the provisions of said statute, and hence this Appellant was convicted without due process of law, and such conviction deprives it of its property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

6. The decision of the Supreme Court of Missouri found this Appellant guilty of a violation of the provisions of Section 129.060, R. S. Mo. 1949, when the facts alleged in the information filed in this cause and against this Appellant were not sufficient to accuse and convict this Appellant of the commission of any crime, and, hence, this Appellant was denied equal protection of the laws contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

7. The judgment of the Supreme Court of Missouri found this Appellant guilty of a violation of the provisions of Section 129.060 R. S. Mo. 1949 when all the facts stipulated in evidence and before the Court show that this Appellant had not violated the provisions of said statute, and hence by such conviction this Appellant was denied the equal protection of the laws contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VII. The cases believed to sustain the jurisdiction are as follows:

Winter v. People of State of N. Y., 68 S. Ct. 665, 333 U. S. 507, 92 L. Ed. 840; Miller v. Schoene, 48 S. Ct. 246, 276 U. S. 272, 72 L. Ed.

368:

Atlantic Coast line R. Co. v. Phillips, 67 S. Ct. 1584,

Nome Ins. Co. v. Dick, 50 S. Ct. 338, 281 U. S. 397, 74 L. Ed. 926:

Herndon v. Lowry, 57 S. Ct. 732, 301 U. S. 242, S1 L. Ed. 1066.

VIII. The validity of the statute here involved was first drawn into destion on the ground of its being repugnant to the Constitution of the United States in the trial Court, to-wit, the Court of Criminal Correction of the City of St. Louis, Missouri, in which the information was filed, and the question was first raised by a motion to quash the information in the grounds set out in Points 1, 2 and 3 of Paragraph VI supra and found on page 5 and 6 of the transcript of the record of the Court below as filed in the office of the Supreme Court of Missouri and page 9 et seq of the certified unprinted record on file with the Clerk of the Supreme Court. The pertinent grounds set out in said motion to quash were as follows:

"3. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that enforcement of the statute sought to be enforced by the information herein-namely Section 11785, R.S. Mo. 1939, will, under Count 2 of said information, deprive this Defendant of his property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

of the United States in that the enforcement of the statute sought to be enforced by the information herein—namely Section 11785, R. S. Mo. 1939 will, under Count of said information, deny to this defendant equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

"8. That said Section 11785, R. & Mo. 1939 is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that the enforcement of said statutes under Count 2 of said information will impair the obligation of contract in violation of Section 10, Article I of the Constitution of the United States:

The motion to quash was overruled, and the matter was heard on an agreed stipulation of facts (transcript of the record of the trial court on file with the Clerk of the Supreme Court of Missouri, pages 11, 12, 13, 14 and 15 and pages 17-21 inc. of the certified unprinted record on file with the Clerk of the Supreme Court), and thereafter the Court adjudged the Appellant guilty of violation of said statute of the State of Missouri (page 12 transcript of the record of the trial court; page 22 of the certified unprinted record in the Supreme Court). Thereafter, and within the proper time, the Appellant in its motion for a new trial niged as error by the trial court its rulings on exactly the same grounds as above set out in full (pages 25-30 inc. of the certified unprinted record). The Court overruled Appellant's motion for a new trial, and thereafter an appeal was taken to the Supreme Court of Missouri.

The grounds asserted in the motion to quash and in the motion for new trial and overruled by the trial court were properly preserved in the Appellant's brief and were fully presented by the brief submitted by the Appellant and in oral argument before Division 1 of the Supreme Court of Missouri, to which Division this cause was assigned and by which Division this cause was heard on the 25th day of September, 1950 (page 78 certified unprinted record). The judgment of the trial court was affirmed by Division 1 of the Supreme Court of Missouri on November 13, 1950 (page 78 certified unprinted record). Appellant duly filed a mo-

tion for rehearing or in the alternate to transfer to the Supreme Court en banc on the ground that a Federal question was involved. Appellant's motion for rehearing was overruled on the 11th day of December, 1950, and its motion to transfer to the Supreme Court en banc was sustained on that same date (page 79 vertified unprinted record).

The same grounds as hereinabove set out were fully briefed and argued by the Appellant before the Supreme Court en banc and the matter was submitted on the 25th day of April, 1951 (page 80 certified unprinted record). The Supreme Court en banc upheld the validity of the statute and rendered a decision against this Appellant, adopting the opinion hitherto handed down by Division 1 on the 11th day of June, 1951, (page 80 certified unprinted record). Appellant's motion for a rehearing was duly filed and was overruled by the Supreme Court en banc on the 9th day of July, 1951 (page 113 certified unprinted record).

IX. The Appellant further states that the first stage in the proceedings at which the Federal question set out in paragraphs 4, 5, 6 and 7 of Paragraph & supra, could be raised was after the judgment of the Supreme Court of Missouri became final by its act of overruling Appellant's motion for rehearing on the 11th day of July, 1951; that until a final decision by the Supreme Court of Missouri finding the Appellant guilty of the grime charged in the information, this Appellant had not been deprived of prop-. erty without due process of law under the provisions of the Fifth Amendment to the Constitution of the United States, or denied equal protection of the law under the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States as set out in the aforesaid paragraphs 4, 5, 6 and 7 of Paragraph V above: that the grounds set out therein did not exist prior to that final judgment and are now being raised for the first time since

this is the first stage of the proceedings at which those particular questions could be raised.

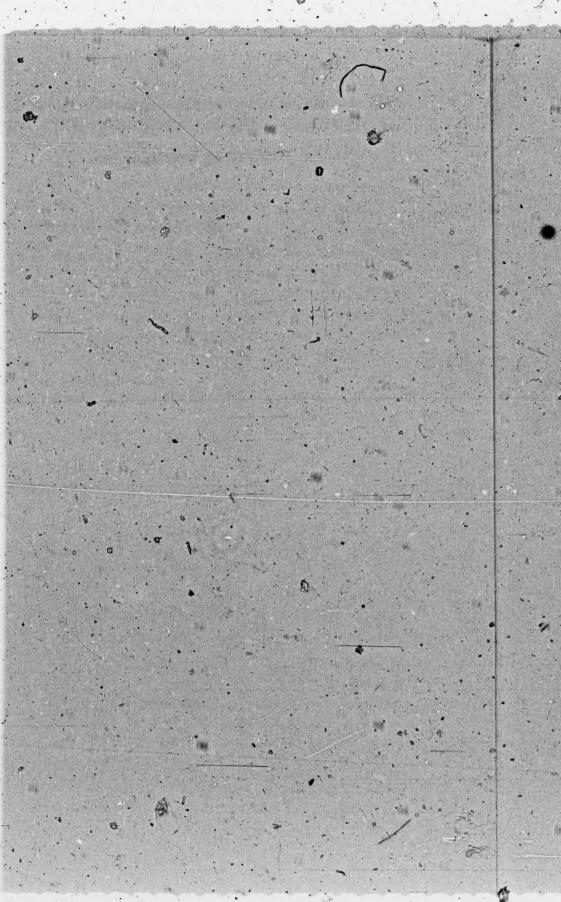
Dated this 14th day of August, 1951.

Louis J. Portner,
509 Olive Street,
Louis, Missouri;

COBBS, BLAKE, ARMSTRONG, TEASDALE & Roos,

THOMAS H. COBBS
ROBERT E. BLAKE
HENRY C. M. LANKIN
By HENRY C. M. LANKIN,

Attorneys for Appellant.



# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1951

## No. 317

STATE OF MISSOURI.

vs.

Appellee,

THE DAYBRIGHT LIGHTING, INC., 18

Appellant.

### ADDENDUM TO JURISDICTIONAL STATEMENT

In order to assure full compliance with the provisions of the Supreme Court Rule 12, Paragraph 1, Daybright Lighting, Inc., the above Appellant, files this additional statement to be attached to the "Statement of Basis on which Appellant contends the Supreme Court of the United States has jurisdiction to review on appeal the judgment appealed from," hitherto filed with the Clerk of the Supreme Court of the State of Missouri on the 14th day of August, 1951. Since, under the state practice in the State of Missouri, assignments of error are included in the brief only and not filed as a separate document, the Appellant states that in its brief filed in Division 1 of the Supreme Court of Missouri, the following points (only pertinent parts are included) were raised:

"B. The statute violates due process.

Section 1, 14th Amendment to the constitution of the United States

- "C. The statute denies equal protection of the laws.
  Section 1, 14th Amendment, constitution of the ...
  United States
- "D. The statute impairs the obligation of contact.

  Section 10, Article 1, constitution of the United States.

After the decision in Division 1 was entered, Appellant, as grounds for transfer of the case to the Supreme Court en banc, set out as part of said motion the following statement:

"The Court has stated in its opinion that the grounds on which the defendant challenges the constitutionality of Section 11785 are: (1) 'That it is violative of the due process clauses of the Constitution of the United States, as defined in Section 1 of the Fourteenth Amendment '5'; (2) 'denial of the equal protection of the laws to all persons within its jurisdiction, as defined in Section 1 of the Fourteenth Amendment of the Constitution of the United States '; and (3) 'impairment of the obligation of contracts as guaranteed by Section 10 of Article I of the Constitution of the United States '.'

In Appellant's brief, filed in the Court en banc, the same Federal Constitutional questions were raised in said brief by the Appellant as had been presented before in Division 1, and as set out verbatim above. It will be readily seen from the excerpt from the Motion for Rehearing filed in Division 1 hereinabove set out that Division 1, in its opinion, passed squarely on the Federal Constitutional questions claimed to be involved here. The opinion of Division 1 was adopted as the opinion of the Court en banc. Clearly, the Federal Constitutional questions here raised were argued

to and passed on by the Supreme Court of the State of Missouri.

Louis J. Portner,

509 Olive Street, S. St. Louis, Missouri

Cobbs, Blake, Armstrong,
Teasdale & Boos;
Thomas H: Cobbs,
Robert E. Blake,
Henry C. M. Lamkin,
506 Olive Street,

St. Louis, Missouri;
By Henry C. M. Lamkin,
Attorneys for Appellant.

#### APPENDIX "A"

IN THE ST. LOUIS COURT OF APPEALS, APRIL SESSION, 1949

No. 27658

STATE OF MISSOURI, Plaintiff-Appellant;

228

The Day-Brite Eighting, Inc., a Corporation, Defendant-

Appeal from the St. Louis Court of Criminal Correction, Hon. Louis Comerford, Judge

Opinion Fileds May 17, 1949

There being a separate appeal by each party, in order to avoid confusion the plaintiff below will be referred to as the State, and the defendant below as the defendant.

On the 24th day of June, 1947, the associate prosecuting attorney filed an information in the St. Louis Court of Criminal Correction, containing two counts, charging the defendant with having violated the provisions of Section of 11785, R. S. Mo., 1939, Mo. R. S. A. Sec. 11785. The first count charged that the defendant, on November 5, 1946, an election day, failed and refused to allow Fred C. Grotemeyer, one of its employees, who was entitled to vote at the election, to absent himself from his employment for a period of four hours between the times of the opening and closing of the polis. The second count charged the defendant with having penalized said employee by deducting from his wages the amount of his earnings for the time he was absent from his work in the exercise of his privilege of being absent therefrom for a period of four hours to vote at said election.

Thereafter, the court overruled defendant's motion to quash the first count of the information, and sustained defendant's motion to quash the second count. From the judgment quashing the second count the State has appealed. The

defendant was tried on the first count, a jury being waived, and was convicted and its punishment fixed at a fine of \$100. From the judgment of conviction on the first count the defendant appeals.

• The prosecution, as above stated, is under Section 11785, R. S. Mo., 1939, Mo. R. S. A. 11785, which is as follows:

"Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting binself, be liable to any penalty. Provided, however, that his employer may specify the hours during which such employee may absent himself as afore-Any person or corporation who shall refuse toany employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

. The facts are not disputed and are as follows:

The defendant is the employer of about 200 workmen, who were divided into shifts or groups, as to their working hours. Fred Grotemeyer, who had been in the employ of defendant for about five years, worked on a shift which began work at 8:00 o'clock a. m. and worked until 4:30 o'clock p. m. with one-half hour off during the noon hour for lubch. His wages were \$1.60 per hour. The day before the election held on November 5, 1946, the defendant caused to be placed on a bulletin board maintained for the purpose of efficial notices to its employees a notice as follows:

"Day-Brite Lighting, Inc., 5411 Bulwer Avenue, St. Louis, Mo. November 4th, 1946. Employees on day shift only wishing to take time off for voting November 5th may do so by leaving work at three p.m. Day-Brite Lighting, Inc.".

On November 2h, Grotemeyer saw Mr. Wilks, who was defendant's plant superintendent, and asked him, "How about getting off at noontime according to the law with pay, four hours from work!" and Mr. Wilks told him "no." The next morning (election day) Grotemeyer again saw Wilks, and the following question and answer appear in the transcript:

"Q. What conversation did you have with him, if any, pertaining to this bulletin you saw displayed?

A. I asked him about the bulletin board. I told him—let me physis myself right here. According to law we should have four it are off from work with pay. He says no. He says it is on the bulletin board. You can get off at three o'clock but you will not be paid for that hour and a half."

Grotemeyer testified that it would take him about twenty minutes to go from his working place to his home, and that his polling place was within 200 feet of his home. That on November 5, 1946, he voted about 5:00-6 clock in the afternoon, and it took him about five minutes to vote. He said that he wanted time off from the noon hour on in order to do a little campaigning, canvass to get out the vote.

There was evidence that fifty years ago about the time of the enactment of Section 11785 (Laws 1897, p. 108), the working day was at least ten hours, and the average was fourteen to sixteen hours, and that today eight hours is the average working day.

The working contracts between the defendant and the labor union to which Grotesnever belonged show that wages were paid the employees on an hourly rate; that the work consisted of forty hours of five eight-hour days, from Monday to Friday, both inclusive, and that the employees contracted to be on the job ready to work at the starting time and to be at work until quitting time (except on specified

holidays and vacation periods, concerning which there is no issue in this case).

Both appeals in the case were taken to the Supreme Court, where the briefs were filed, and the Supreme Court made an order as follows: "Now at this day it appearing to the satisfaction of the Court that there is no constitutional question in a jurisdictional sense presented in the above-entitled cause, the Court doth order that said cause be and the same is hereby transferred to the St. Louis Court of Appeals."

If the Legislature or the courts in construing legislative acts were required to draw distinctions with hair-like accuracy as to what would constitute taking property without . due process of law, there are few laws looking to the health and safety and working conditions of employees which would not come under the constitutional inhibition. It cannot be said that a constitutional question is involved in a inrisdictional sense as to the legislative right to adopt reasonable regulations for the operation of corporations. which are themselves creatures of statutes, and which regulations might place an inconsequential burden on the corporation. In the case of Noble State Bank v. Haskell, 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, the question involved was whether an assessment against banks for the purpose of creating a Depositors' Guaranty Fund came within the inhibition of the due process clause of the federal Constitution; and the Court said (219 U.S. 110, 111):

"In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have a few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United

States, judges should be slow to read into the latter a nolumus murare as against the law-making power.

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see Receiver of Danby Bank v. State Treasurer, 39 Vermont, 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361. Strickley v. Highland Boy Mining Co., 200 U. S. 527, 531, Offield v. New York, New Haven & Hartford R. R. Co., 203 U. S. 372. Bacon v. Walker, 204 U.S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co v. Indiana, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

And so it resolves itself into a question of whether the taking is reasonable and necessary to carry into effect the object and purpose of the legislative enactment with as little burden as possible on either the employee or the employer. In other words, if the taking is for a public good and is so comparatively insignificant with the benefit to the State of the law, so that no two logical minds could differ, the persons affected could not claim, at least in a purisdictional sense, that the Constitution was involved in

a construction of the meaning of the law. Such would be this case, where the least possible burden is case on the employer in order to accomplish the purpose of the law, and so, as said by the Supreme Court in transferring the case to this court, "There is no constitutional question in a juris-

dictional sense presented."

In view of the fact that there is no constitutional question in a jurisdictional sense presented in this case, most of the able and exhaustive arguments and briefs are not applicable to the questions we must determine on these appeals, which is simply the logical meaning of the words of the statute. On the other hand, we must not lose sight of the provisions of the Constitution, lest we, in determining the meaning of Section 11785, attribute to it a meaning which would violate any of the provisions of the organic law./ Where a statute is capable of two interpretations. one of which is constitutional and the other unconstitutional. the courts will interpret the language in favor of constitutionality. State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 342, Mo. 365, 115 S. W. 2d 816. And the court of appeals has the duty to construe the meaning of a statute and to give it a reasonable and logical meaning. if such can be done, and with a view that the statute as construed is a reasonable and constitutional exercise of legislative functions. In re H- S-, 236 Mo. App. 1296, 165 S. W. 2d 300; Kelly v. Howard, 233 Mo. App. 474, 123 S. W. 2d 584.

That every citizen should be given both the right and the opportunity to vote is a matter of public interest, and any law having for its purpose the guarantee of such right and opportunity should be upheld if it is possible to do so. Such we take it was the legislative purpose in the enactment of Section 11785. And the purpose or legislative intent was not to financially enrich the voter or to place an unnecessary and unreasonable burden on the employer. It was not intended to apply only to large industrial corporations, but applies with equal force to the employer of the clerk in a crossroads store, the domestic servant in the home, and the laborer on a farm.

To say this section is devoid of uncertainty or ambiguity would be begging the question. One theory advanced is

that under this section the employee is entitled to four hours' absence from his regular working hours on the day of election, whereas another theory advanced is that the employee is entifled to four hours time in which to vote during the thirteen hours comprising an election day. This last stated theory, which we think is correct, means that if the employee's regular working day leaves him at least four consecutive hours on election day during which he would not be engaged in actual service to his employer, the object and purpose of the statute has been met, and such employee is not entitled to be absent from his regular a working hours at all; or, if such time when the employee is not actually engaged in service to his employer is less than four hours (in this case two and one-half hours), the employer shall permit the absence of the employee from his services for a sufficient time (in this case one and onehalf hours) to make up four full hours. Obviously the two opposing views bring about different results. For instance, if the views of the State prevail, as to this employee, he would quit his work at the noon hour, thereby having seven hours' time in which to vote, and the employer would have to pay him \$6.40 for four hours of services which were not rendered, whereas if our view of the statute is correct, this . employee would quit work at 3:00 O'clock p. m. instead of . 4:30 p. m. thus depriving the employer of only one and one-half hours of service instead of four hours, and the employee would have four full hours to vote. Suppose the employee is working on a shift from 4:00 a. m. to 12:00 noon. If the State is correct in its view of the statute the employer would be compelled to grant absence on pay to the employee for four hours before 12:00 noon, regardless of the fact that such employee could be on his job until 12:00 noon and then have seven hours' time in which to vote. On this theory the employee would have eleven hours out of the election day thirteen hours.

If the views of the State are correct there would indeed be a constitutional question involved, not only under the "due process" clause of Section 1, Amendment XIV to the Constitution of the United States, and Section 10, Article I, Constitution of Missouri, 1945, but also under the "equal protection of the laws" clause of Section 1, Amendment ×

XIV to the Constitution of the United States, and Section 14, Article I, Constitution of Missouri, 1945, because of an unnecessary, arbitrary and unreasonable burden being visited upon the employer, whether it be an individual or corporation in order to accomplish the simple purpose of the employee having four hours on an election day in which to vote. Then why give the statutory words a strained construction which would invalidate it, if the words are just as susceptible to a meaning that makes it a reasonable and valid law! The Legislature most assuredly had in mind the Constitution, and its various provisions, when it enacted the law, and it is the legislative intent we are seeking

in construing the law.

The primary rule of construction of statutes is to ascertain and give effect to the lawmakers' intent. It is of significance that this statute was enacted over fifty years ago, when working hours ranged from ten to sixteen hours a day. It was at that time that the words were used that the employee "be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing of the polls." (Italies ours). The italicized words would be useless and have no place in the sentence where used if the four-hour period is to be restricted to the employe's regular working hours, as the State would contend. But even in that day there were many employees whose service ended at noon, or by 3:00 o'clock in the afternoon, and we can see no reason wby the lawmakers intended to require the employer to give such employee more time to vote, if his regular working schedule gave him a full four hours of free time. Then there was added the proviso, "that his employer may specify the hours during which such employee may absent himself as aforesaid." "As aforesaid" could only mean four hours between the times of opening and closing the polls. The law-makers intended to secure to every citizen both the right and the opportunity to vote. If the voters' regular working hours already gave him the four-hour opportunity to vote, there was no useful purpose in the section at all as to such employee. If the voter already had two and one-half hours' free time, as did Grotemeyer, then if the employer gave him an additional

one and one half hours, the purpose of the law would be met by Grotemeter's having four full hours in which to vote, and with no more inconvenience and expense to the employer than were necessary and reasonable to effect the purpose of the law. Thus viewing Section 11785 the defendant was improperly convicted under the first count of the information.

The second count of the information presents a different question. It charged that the defendant penalized Grotemeyer by deducting from his salary the amount of his earnings for the time he was absent from his regular working hours in the exercise of his voting privilege, which in this case would be one and one-half hours. If the defendant did that it was clearly a violation of Section 11785, which declares any employer guilty of a misdemeanor who "shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege." (Italics ours).

This part of the section is not ambiguous and needs no elucidation. It provides in plain and simple words that there shall be no deduction of wages because the employee exercises the privilege of having a full four hours during the election day thirteen hours in which to vote. If it required one and one-half hours from his regular working day to make up the four hours, and the defendant fleducted from his wages for the one-half hours, the defendant would clearly be guilty of a violation of the section under the second count of the information.

It follows that the judgment of conviction of the defendant, under the first count of the information, should be reversed, and that the judgment quashing and dismissing the second count of the information should be reversed and the cause remanded for trial on such second count. It is so ordered.

WM. C. Hughes, Judge.

Lyon Anderson, Presiding Judge, concurs. Edward JeMcCullan, Judge, concurs.

### APPENDIX "B"

IN THE SUPREME COURT OF MISSOURI, EN BANC, APRIE SESSION, 1951

No. 41979

STATE OF MISSOURI, Respondent,

vs.

DAY-BRITE LEHTING, INC., & Corporation, Appellant

Appeal from the St. Louis Court of Criminal Correction

HONORABLE LOUIS COMERFORD, Judge:

This is an appeal from a conviction in the St Louis Court of Criminal Correction by which defendant appellant (hereinafter designated as defendant) was adjudged to pay a fine of one hundred dollars for violation of Section 11785, Mo. R.S.A. The case was tried on an agreed statement of facts. The two questions for determination are whether (a) the facts support the verdict and (b) whether that part of the section under which defendant was convicted is violative of the constitutional rights of defendant as guaranteed it under the Constitutions of the United States and the State of Missouri.

Section 11785, enacted in 1897 (Laws 1897 [Section 1] p. 108), reads: "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty: Provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages

because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section shall be deemed guilty of a misdemeanor,

The information, as originally filed, charged defendant in count one with refusing to permit its employee (Fred C. Gretemeyer) to absent himself from his employment for a period of four hours between the time of opening and closing of the polls on the general election day of November 5, 1946; in count two with penalizing him by deducting from his salary the amount of his earnings for the time he was absent from his work on that day. Defendant's conviction under count two is the basis of this appeal. For a history of the case prior to this appeal, see State v. Day-Brite Lighting, Inc., 220 S.W. 2d 782.

Defendant, a Missouri corporation, operated a manufacturing plant in the City of St. Louis and its products "moved in interstate commerce". Fred C. Grotemeyer was and for several years prior to November 5, 1946, had been in its employ. He was a member of Local No. 1, International Brotherhood of Electrical Workers, which had a contract with defendant covering wages, hours and other working conditions of its employees. A work week consisted of forty hours, divided into five eight hour days. Grotemeyer was paid on an hourly basis at the rate of \$1.60 per hour for each hour worked. His work day began at 8:00 a.m. and closed at 4:30 p.m., with a lunch period of thirty minutes from 12:00 to 12:30 noon. He was to receive pay only for hours actually worked. rules of defendant provided that no employee, except in cases of sickness or emergency, should be absent from work without permission.

On the day prior to the general election of November 5, 1946, Grotemeyer, who was qualified to vote in that election, asked permission to absent himself for a period of four hours between the beginning and end of his scheduled work day "to do campaigning, to vote and to get out the vote". This specific request was refused, but defendant on that day posted on its bulietin board a notice permitting all employees on the day shift (including Grotemeyer) to take time off to vote at 3:00 p.m., on November 5th. This

was one and one-half hours earlier than Grotemeyer's work day normally would end, but it did permit him to absent himself from his employment for four consecutive hours between the opening and closing of the polls, which were 6:00 a, m. and 7:00 p.m. On November 5th, Grotemeyer absented himself from his employment at 3:00 p.m. and thereafter voted. He was paid by defendant only for those hours worked on November 5th, to-wit: six and one half hours, or the time from 8:00 a.m. to 3:00 p.m., less the thirty minute lunch period.

One hundred fifty-eight of defendant's employees worked at an average hourly rate of \$1.089 from 8:00 a.m. to 4:30 p.m.; fifty-eight employees worked at an average hourly rate of \$1:03 from 7:00 a.m. to 3:30 p.m., and seven employees worked at an average hourly rate of \$.8646 from 7:00 a.m. to 3:00 p.m. The total amount of wages paid all employees for not working, if all took four hours off from the scheduled work day to vote, would be \$951.42, and four hours of production loss amounting to \$7138.00 would have resulted. In April, 1949, there were 230,600 hourly-paid employees in the State of Missouri engaged in manufacturing industries and 729,600 employees in non-manufacturing industries, and the average hourly earnings of these employees in manufacturing industries was \$1.302.

Defendant's first contention is that under the agreed statement of facts no violation of Section 11785 was shown. Its argument runs in this wise: "It is not charged defendant threatened to discharge or did discharge Grotemeyer or subject him to any penalty or deduction of wages earned because of the exercise of the privilege of voting. Grotemeyer was paid the amount due him for the work he did for Day-Brite Lighting, Inc. He was not penalized for voting or for taking time off for voting."

This contention is not sound. It is the clear intendment of the act that the employee shall be paid during his authorized absence as though he had worked. Otherwise, of course, there could be neither penalty nor deduction. It would be an impossibility for the two necessary elements of the offense, to-wit: absence from work and deduction of wages during such absence, ever to come into coexistence

under defendant's contention. Regardless of the validity of the act on constitutional grounds, its meaning is clear and the deduction of one and one-half hours from Grotemeyer's wages was a violation of its terms.

The grounds on which defendant challenges the constitutionality of Section 11785 are: (1) violation of the due process clauses of the Constitution of the United States. as defined in Section 1 of the Fourteenth Amendment, and the Constitution of the State of Missouri, as defined in Section 10 of Article I; (2) denial of the equal protection of the laws to all persons within its jurisdiction, as defined in Section 1 of the Fourteenth Amendment of the Constitution of the United States and of Section 14 of Article I of the Constitution of Missouri; (3) impairment of the obligation of contracts as guaranteed by Section 10 of Article I of the Constitution of the United States and Section 13 of Article I of the Constitution of Missouri: and (4) violation of Section 28 of Article IV of the Constitution of Missouri of 1875, and of Section 23 of Article III of the Constitution of Missouri of 1945, which provide that no bill shall contain more their one subject, which shall be clearly expressed in its title. . (There is another general claim of unconstitutionality which we consider inadequate and which is disposed of later herein.)

The state contends defendant has not properly raised the question of constitutionality. Each of these grounds, with the exception mentioned, was set forth with particularity in a timely motion to quash, the motion for new trial, and in defendant's brief. That is sufficient. Section 4125, Mo. R. S. A.; State v. Hammer, 333 Mo. 40, 61 S.W. 2d 965, 966. Especially is this true where it is evident from the entire record that the only issue before either the trial court or this court, except that the facts did not support the verdict, was the constitutionality of that part of the section under which defendant was charged. City of St. Louis v. Friedman, 358 Mo. 681, 685, 216 S.W. 2d 475, 477.

It is apparent that Section 11.785 is violative of the due process clauses of both the Federal and State Constitutions unless its enactment is within the police power of the State.

The State has placed in its brief a tabulation of statutes dealing with the right of employees to absent themselves on election days. Sixteen states make it unlawful for the employer to dock the employee's wages during such absence, to-wit: Arizona, California, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, New York, Ohio, South Dakota, Texas, West Virginia and Wyoming. Colorado and Utah statutes provide that there shall be no dockage except when the employee is paid by the hour. Six states authorize absence of the employee on election days, with no provision for payment of wages. Illinois and Kentucky statutes relating to the same subject matter have been held unconstitutional. A New York statute has been held constitutional.

Defendant strongly relies upon the case of People v. Chicago, Milwaukee & St. Paul Railway Co., 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610. It held unconstitutional a statute similar to Section 11785 on grounds that it deprived the employer of its property without due process of law. denied equal protection of the laws and was an unreasonable abridgment of the right to contract. That opinion was written in 1923. It is interesting to note that in 1944, the same court, referring to its 1923 opinion, commented "It is urged that the State may not take private property nor money for a private use \* \* \*, and the case of People v. Chicago, M. and St. P. R. Co., 306 Ill. 486, 138 N. E. 155, 158, 28 A.L.R. 610, is cited in support of such contention. However, this [pay-while-voting] statute, re-enacted and amended from time to time, still contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. \* \* \* The growing complexity of our economic interests has inevitably led to an increased use of regulatory measures in order to protect the individual so that the public good is reassured by safeguarding the economic structure upon which the good of all depends." Zelney v. Murphy, 387 Ill. 492, 56 N. E. 2d 754, 757.

Defendant also cites the case of Illinois Cent-R. Co. 1. Commonwealth, 305 Ky. 632, 204 S. W. 2d 973, in which the Court of Appeals of Kentucky held a pay-while-voting statute of that state unconstitutional. The decision in this case

was based on the 1923 Illinois decision. It extols at great length the sanctity of the voting privilege and holds constitutional that part of the statute giving the employee the right to absent himself for a period of four hours on election day, but condemns as violative of due process the part making it a misdemeanor to withhold his wages for so doing.

The opinion states: "The Commonwealth makes the contention that our legislative authority had a right, under the exercise of its police power, to adopt the law in question, since its adoption was in the interest of the general welfare of the public. "However, we have said that the legislative authority may not, under the guise of promoting public interest, arbitrarily interfere with private business. City of Louisville v. Kuhn, 284 Ky. 684, 145 S. W. 2d 851. And it is always appropriate to remember that the police power is not without its limitations, since clearly it may not unreasonably invade and violate those private rights which are guaranteed under either federal or state constitution. 11 Am. Jur. 992." Thus, the opinion goes from premise to conclusion, with no statement of the reasoning by which it was reached. It is not helpful.

As against the Illinois and Kentucky cases, the state cites the case of People v. Ford Motor Co., decided by Appellate Division of the Supreme Court of New York in 1946, 271 App. Div. 141, 63 N. Y. S. 2d 697. That case held constitutional a New York statute which makes it a misdemeanor . to refuse an employee the privilege of voting or to deduct. from his wages for exercising the privilege. We quote portions of it: "The statutes in question, in force for more than half a century, deal directly with a detail as to the exercise of the elective franchise a subject matter which, under our form of government, is in itself a primary act of sovereignty. To take measures to insure the full and free performance of that act is therefore in the interest of the general welfare, and as such may be said to call forth 'society's natural right of relf defense' which is inherent in sovereignty itself and which has been generally termed the police power. ..

"An employer employee relationship may be said to have in it such a power of dominance on the part of the employer as is capable of thwarting the wholesome exercise of the right to vote at an election. The fact that such abuses have occurred is historical. To avoid such evils, to encourage the right of suffrage, to keep it pristine and render it efficient—all this pertains to the public welfare and, in the attainment of those objectives, the burden which the statutes cast upon all in the role of an employer is one lawfully placed in a design for the common good, and the burden is so slight that it may not be said to be unduly oppressive. That the burden may bear unequally does not render its placement unlawful."

And .

A precise definition of police power is not found. "It is not susceptible of circumstantial precision because none can foresee the ever-changing conditions which call for its exercise. Moreover, it has been held that these conditions render it inadvisable to define the power accurately." 11 Am. Jur., Constitutional Law, § 246, pp. 970, 971.

"Judge Cooley says that the police power of a state 'embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others,' and the courts have quoted this definition with approval many times. Finally, it has been said that by means of this power the legislature exercises a supervision over matters involving the common welfare and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large." Id. § 247, pp. 972, 973.

Discussing police power, this court said in Household Finance Corporation v. Shaffner, 356 Mo. 808, 818, 203 S. W. 2d 734, 739: Section 3, Article I, states that the police power of the state remains exclusively in the people; and Section 3, Article XI, provides that 'the exercise of the police power of the state shall never be surrendered'. It is a familiar principle that 'the state constitution is not a grant of power, but only a limitation, as far as the legislature is

concerned'; and, therefore, except for the limitations imposed thereby 'the power of a state legislature is unlimited and practically absolute'. 11 Am. Jur. 894, Sec. 193."

The police power of the state is frequently invoked in legislation relating to the economic and physical welfare and safety of employees and the public in general, all of which are an expense to the employer or the manufacturer; and such legislation is uniformly held constitutional in principle. Some of them are: workmen's compensation laws, unemployment compensation laws, semi-monthly payment of wage laws, minimum wage and hour laws, Sunday labor laws, and the great multiplicity of safety and health laws. See cases referred to in State v. Day-Brite Lighting, Inc., supra, 1. c. 784; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 81 L. Ed. 1245; Steward Mach. Co. v. Davis, 307 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A.L.R. 1293; Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112.

If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also. The right of universal suffrage is the attribute of sovereignty of a free people. We accept as a verity that "Eternal vigilance is the price of liberty". For the vast majority the only opportunity to exercise that vigilance is in the polling place:

That every citizen should be given both the right and the opportunity to vote is a matter of public interest, and any law having for its purpose the guarantee of such right and opportunity should be upheld if it is possible to do so. Such we take it was the legislative purpose of the enactment of Section 11785. And the purpose or legislative intent was not to financially enrich the voter or to place an unnecessary and unreasonable burden on the employer. State v. Day-Brite Lighting, Inc., supra, 1. c. 785.

Appellant argues that? "The Company is deprived of property of two kinds under this Statute. It is deprived of tangible property, that is, money that it is forced to pay to its employees for work not performed and for which the Company receives nothing. "If all employees were granted four hours off with pay from the scheduled work.

day it would cost the Company in this case \$951.42 by way of pay to its employees and an additional sum of \$7138.00 for loss of production."

It does not necessarily follow, however, that the act is thereby rendered unconstitutional. The figures quoted, above have little probative value. They do not show, nor is there any evidence tending to show—either percentage wise or otherwise—their relationship to the overall cost of

defendant's products.

In a well documented article on the subject of "Pay While Voting" in the Columbia Law Review of 1947, page 140, the writer makes this statement: "Whatever may be the wisdom of pay while voting statutes, they do not appear so arbitrary or unreasonable as to violate due process requirements. The burden imposed on the employer is relatively slight and the interest subserved, the right to vote, relatively high."

When we consider the infrequency with which elections are held in comparison with the total working days in a calcular year, we cannot say as a matter of law that the economic burden placed on employers by this statute is unreasonable.

To secure the free and open elections guaranteed by our State Constitutions (Constitution of 1875, Sec. 9, Art. II; Constitution of 1945, Sec. 25, Art. I), the General Assembly enacted legislation (Laws 1893, p. 157) to prevent corrupt practices in elections. Section 11785 was not in that act, but in 1897 (Laws 1897, p. 108) it was amended to include the present Sections 11785 to 11787. The Legislature, in effect, thereby declared that in order to more adequately secure, free and open elections it was expedient to require employers to afford their employees not only an opportunity to vote but also that they might exercise that right without penalty or deprivation of wages.

In determining whether a statute is constitutional it is not the province of courts to determine its wisdom or adequacy. "The basic principles that courts only look to the constitutionality of legislation, and not to its propriety, justice, wisdom, necessity, expediency, or policy have constantly been applied in cases involving police regulations.

If an act had a real and substantial relation to the police power, then no matter how unreasonable or how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds." II Am. Jur. § 306, p. 1089.

"If there is any reasonable basis upon which the legislation may constitutionally rest the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court. "Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws." Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 1147, 125 S. W. 2d 23, 31.

We conclude that the provisions of Section 11785 are within the police power of the state and do not violate the due process clauses of either the Federal or State Constitutions.

Defendant invokes the last clause of Section 1 of the Fourteenth Amendment of the United States Constitution which forbids any state to deprive any person the equal protection of the laws (and refers to Section 14, Article I, Constitution of Missouri is a corollary). The cases cited in its brief support the principle announced in the mendment, but they are not decisive of the question involved here. They are: Truax v. Corrigan, 257 U, 3–312, 16 L. Ed. 254; Prost v. The Corporation Commissions of the State of Oklahoma, 278-U, S. 515, 73 L. Ed. 483; State v. Mikšicek, 225 Mo. 561, 125 S. W. 507; State v. Empire Bottling Co., 26f Mo. 300, 168 S. W. 1176; Ex Parte French, 315 Mo. 75, 285 S. W. 513; State v. Paylor, 351 Mo. 725, 173 S. W. 24 902.

Defendant's argument is: "It is submitted that the statute in question violates this constitutional guarantee in that it singles out as a class those who employ labor as against those who do not. It even goes further to single out one part of the labor-employing class; namely, those who employ labor on an hourly paid basis as opposed to those who employ labor paid by the week or the month." The courts have often decided that the classification of the relations of employers are proper and necessary for the welfare of the community. Truax v. Corrigan, supra. When all persons within the purview of a statute are subjected to like conditions, then they are afforded equal protection of the law. Stone v. City of Jefferson, 317 Mo. 1, 293 S. W. 780; Hull v. Baumann, 345 Mo. 159, 131 S. W. 2d 721; St. Louis Union Trust Co. v. State of Missouri, 348 Mo. 725, 155 S. W. 2d 107. \*\* as long as the law operates alike on all members of a class \*\* it is not subject to any objections that it is special or class legislation." 11 Am. Jur., Constitutional Law. § 478, p. 144.

Section 11785 is singularly free from criticism leveled against it by this assignment. It applies with complete uniformity of duty and privilege, respectively, to all employers and to all employees, without regard to the method of cumputing their compensation. This contention is ruled against defendant.

Defendant contends that Section 11785 violates Section 10, Article I, of the Constitution of the United States and Section 13, Article I, of the Constitution of Missouri. These sections forbid legislation impairing the obligations of contracts.

Freedom of contract is always qualified by valid police "This power under the Constitution to restrict freedom of contract has had many illustrations. That itemay be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day \* \* \*: in limiting hours of work of employees in manufacturing establishments . . ; and in maintaining workmen's compensation laws \* \* . In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppres-. . . " West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330,

In the case of Gideon-Anderson Lumber Co. v. Hayes, 348 Mo. 1085, 156 S. W. 2d 898, 899, this court quoted with approval from Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 202, 31 S. Ct. 164, 169, 55 L. Ed. 167, as follows. "It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the demal of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

Having determined that the subject matter of Section 11785 is within the police power of the state, that it is not shown as a matter of law to be unreasonably burdensome, and that is calculated to protect the general welfare of the people, we hold it does not unconstitutionally impair the obligations of the contract between defendant and its employees.

Is the act, of which Section 11785 is a part, in contravention of Section 23, Article III, Constitution of 1945? This provision was also in the Constitution of 1875 as Section 28, Article IV. It provides that "no bill " shall contain more than one subject, which shall be clearly expressed in its title". Section 11785 is an amendment to the "corrupt practice act" of 1893 (Laws 1893, p. 157). The title of the original act is: "AN ACT to prevent corrupt practices in elections, to limit the expenses of candidates, to prescribe the duties of candidates and political committees, and provide penalties and remedies for violation on [of] this act". No fault is found with the title of the original act.

The complaint is that the sections added by an amendatory act of 1897 (Laws 1897, p. 157), one of which is now Section 11785, were not germane to the subject matter of the original act; and that, inasmuch as the amendatory act of 1897 adopted by reference and without change the title of the original act, the new subject matter thus added is not clearly expressed in its title.

"If the title of an original act is sufficient to embrace

the provision contained in an amendatory act, it will be good, and it need not be inquired whether the title to the amendatory act would, of itself, be sufficient. State ex rel. Drainage District v. Hackmann, 305 Mo. 685, 701, 267 S.W. 608. See also Young v. County of Greener 342 Mo. 1105, 119 S.W. 2d 369, and cases therein cited.

We, therefore, look to the title of the original act to determine whether the subject matter of the amendatory act is "germane to and within the scope of the general purpose of the bill (original act) as declared in its title and which, although not set forth in the particulars expressed in the title, are not out of harmony with them?". Graves v. Purcell, 337 Mo. 574, 85 S.W. 2d 543, 548. See also Edwards v. Business Men's Assur. Co., 350 Mo. 666, 168 S.W. 2d 54, 83.

Section 11785, by its terms, makes it a crime for an employer to deny its employees the privilege of absenting themselves from their work on election days and a crime to dock their wages if they do. In essence, therefore, the employer who practices the acts condemned by the statute, as did defendant, is suilty of "corrupt practices in elections", which is the first definitive phrase of the original act. We will not further labor the matter. The title of the amendatory act, by its reference to the original, is sufficient.

Finally, it is urged that Section 11785 is in conflict with 11786 and is, therefore, unconstitutional "in that, if defendant should conform with the provisions of Section 11785, it would then necessarily be in violation of Section 11786, R.S. Mo. 1939". We are pointed to no constitutional provision to support the contention, and we find none. The assignment is insufficient to raise the quantion. State ex rel. Karbe v. Bader, 336 Mo. 259, 78 S.W. 2d 835.

The contention, however, obviously is without ment. Section 11786 provides: "It shall not be lawful for any corporation "to induce or persuade any employee" to vote or refrain from voting for any candidate, or on any question to be determined or at issue at any election.

"Section 11785 is directed at the employer who refuses to give the employee time to vote or penalizes him if

he takes the time. Section 11786 is directed at the employer inducing or persuading the employee how to vote. They are not in conflict.

The judgment of the trial court is affirmed.

FRANK HOLLINGSWORTH,

Judge.

Dolton, Leedy & Tipton, JJ. concurt Plyde, J. dissents in sep. op.: Vandeventer, Special Judge, dissents in sep. op. filed and concurs in sep. op. of Hyde, J.; Conkling, J., dissents and concurs in dissenting opinions of Hyde, J. and Vandeventer, Special Judge.

IN THE SUPREME COURT OF MISSOURI, COURT EN BANC, APRIL 1951 SESSION

No. 41,979

STATE OF MISSOURI, Respondent,

23

DAY-BRITE LIGHTING, INC., Appellant.

#### DISSENTING OPINION

I respectfully dissent from the ruling that a crime was committed in this case. Strict construction of criminal statutes is a fundamental principle of our law. "Criminal statutes are to be construed strictly: liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. No one is to be made subject to such statutes by implication." (State v. Bartley, 304 Mo. 58, 263 S. W. 95; See also State v. Lloyd, 320 Mo. 236, 7 S. W. (2d) 644; State v. Taylor, 345 Mo. 325, 333 S. W. (2d) 336; State v. Dougherty, 358 Mo. 734, 216 S. W. (2d) 467; Tiffany v. National Bank of Missouri, 85 U. S. 409, 18 Wall. 409, 21 L. Ed. 862.) A defendant should not be held to have committed a crime by any act which is not plainly made an offense by the statute.

The statute in this case, Sec. 129.060, R. S. 1949, is as follows: "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to

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absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty; Provided, However, that his eniployer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty, or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeaner, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

The first Sentence states the privilege conferred upon an employee. The second sentence makes it a crime for an employer to refuse to any employee the privilege conferred by the first sentence. Nowhere in the first sentence is it stated that the privilege includes payment by the employer to the employee for time or activity not covered by the terms of his employment. It only says that he shall not be liable to any penalty. When, as here, the contract (under which the employee agrees to work and under which the employer obligates himself to pay) provides that the employee is to receive \$1.60 per hour for each hour worked. there could be no penalty by not paying him what he has not earned. It is true that the second sentence of the statute makes imposing a "penalty or deduction of wages" an'offense, and the by includes "deduction of wages" in the definition of the term "penalty" but how can there be a "deduction of wages" unless some wages have been carned? It is conceded here that the employee was paid for the full time he had worked on election day and every other day. How can an employee, who is paid on the basis of so much per hour for every hour worked, and who receives pay at the agreed rate for every hour of work actually performed, be subjected to "deduction of wages" by not being paid more! There must first be a right to

wages before there can be a deduction of wages, and there is nothing in this statute which creates a right to any wages or pay beyond that for which the parties have contracted. Therefore, no duty is imposed on an employer to pay more than is provided for by the contract of employment made by the parties themselves. I think to construe it otherwise would be to make such employers and employment contracts subject to this statute purely by implication, and to me a very far fetched implication at that.

Furthermore, I think to construe this statute as creating a right to wages beyond and in addition to what the parties have agreed upon, would make it unconstitutional as includin an additional subject not clearly expressed in the title, in violation of Sec. 23, Art. III of our Constitution. This is a very broad statute; it covers every election of any kind and every kind of employment, agricultural and domestic, as well as industrial. Surely to create such a broad and all inclusive right and obligation as to require any person, who employs another to work and be paid by the hour, to also pay him on any election day for the time he takes to vote (up to four hours) is a new subject to our law and our economy. The purpose of this section of the-a Constitution is to prevent the public and the members of the Legislature from being misled as to the contents of a bill. (State ex rel. United Railways Co. v. Wiethaupt, 231 Mo. 449, 133 S. W. 329; State ex inf. Barrett v. Imhof. 291 Mo. 603, 238 S. W. 122; see also Hunt v. Armour & Co., 345 Mo. 677, 136 S. W. (2d) 312.) The title to this act was: "An Act to Amend an Act Entitled 'An Act to Prevent Corrupt Practices in Elections, to Limit the Expense of Candidates, to Prescribe the Duties of Candidates and Rolitical Committees, and Provide Penalties and Remedies for Violation of This Act," approved March 31, 1893, by inserting between Sections 4 and 5 three new sections to be known as Sections 4a, 4b and 4c." (Laws 1897, p. 108.) It seems to me clear that neither this title. nor the title to the original." Corrupt Practices Act" included in it, gave any indication whatever that a new right was being created to obligate every employer to

pay wages to anyone employed by him, for time taken to vote, in addition to the wages and method of work and

payment agreed on between them.

It is, of course, highly desirable to include in the corrupt practices act a prohibition against any influence or intimidation of an employee by an employer and certainly also against imposing any penalty or making any deduction of wages actually earned and due under the contract between them. It is equally important to safeguard the employee's right of franchise by requiring his employer to allow him time to vote; and to make a violation of such obligations by the employer a criminal offense. An employee, whose contract is to be paid by the month or year, has, of course, earned his pay even though he has taken off from his duties some time to vote or for other personal purposes. It would certainly be a violation of the employment contract, as well as a corrupt practice, for an employer to hold out part of compensation earned, under such circumstances. However, the matter of time of service and method of compensation is a matter of contract, at least until the State steps in to regulate it, and certainly when the State does decide to do so thy fixing maximum hours, minimum hours or requiring pay for an outside activity) that is a separate and distinct subject from election laws or corrupt election practices.

I think the judgment should be reversed.

LAURANCE M. HYDE,

Judge.

Conkling, J. and Vandeventer, Spec. J., concur.

# IN THE SUPREME COURT OF MISSOURI, COURT EN BANC, APRIL 1951 SESSION

No. 41,979

STATE OF MISSOURI, Respondent,

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DAY-BRITE LIGHTING, INC., Appellant.

DISSENTING OPINIO

In addition to the reasons given by Judge Hyde in his dissenting opinion, in which I concur, I think this cause should be reversed because that part of Sec. 11,785 upon which this conviction is based conflicts with the State and Federal Constitutions. I believe that section (now Sec. 129,060 R. S. Mo. 1949) is unconstitutional in so far as it makes it a crime for an employer to deduct from the pay of his employee the amount of time lost by the employee in absenting himself on election day. In my judgment, it violates the provisions of both the state and federal constitutions which forbid the taking of property without due process of law, and guarantees to every citizen the equal protection of the law. (Am. XIV Const. U.S. Sec. 1. Art. 1, Sec. 10, Const. Mo. 1945) The statute in question is as follows:

"Any person entitled to vote at any election in this state, shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty: Provided, However, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person ar corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said élection, or shall cause any employee to suffer

any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars." (Italies mine)

A careful reading of this statute demonstrates that its main purpose was to allow every Employed citizen to absent himself from his labor on election days long enough to cast his ballot. There is nothing in this statute that requires him to vote, although he may demand four hours relief between the opening and closing of the polls. The part that I think is unconstitutional is that part which condemns the employer if he deducts any of the employee's wages. Really, it isn't a deduction of wages for the employee has rendered no services for which he should be paid. The statute apparently means that if the employer fails to pay the employee for work that he does not do during the usual working hours when the employee is absent, the employer is deemed guilty of a misdemeanor. He is guilty, according to the statute, if he "shall cause any employee to suffer any \* \* \* deduction of wages because of the exercises of such privilege, privilege given by the words of the statute is not the privilege of voting but it is the privilege of absenting himself for four hours between the opening and closing of the polls. Whether reference to the privilege or duty of voting was left out deliberately and designedly, we have no way of knowing, but clearly under the statute, the employer could be punished for deducting any wages of the employee during the time he has absented himself, whether he voted or not. However, if the statute did specifically say that the employee must voter if he takes the time off, I am still of the opinion that it attempts to take property of the employer without due process of law, and denies him the equal protection of the law.

Due process of law, when referring to legislation, has been defined as follows:

As applied to legislation, due process of law means statutes that are general in operation and affect the

rights of all alike." (16 C.J.S. Constitutional Law, Sec. 567 (c) Page 1145)

It does not mean merely an act of the legislature, for such a construction would abrogate all restrictions on legislative power. Qually vs. Keebler, 185 N. W. 554, 175 Wis. 428.

There are decisions that hold squarely under a statute almost identical with this one that it is violative of these constitutional guarantees. Those cases are: People vs. Chicago M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610. McAlpine vs. Dimick, 157 N. E. 235, 326 Ill. 245. International Shoe Co. vs. Caldwell, 204 S. W. (2) 973, 305 Ky. 632, Cer. den. 92 L. Ed. 1767, 334 U. S. 843, 68 S. Ct. 1511.

Division One says in its opinion:

"It is apparent that Section 11785 is violative of the due process clauses of both the Federal and State Constitutions unless its exactment is within the police power of the State."

So if it can be justified at all, it must be based on the valid exercise of the police power. I recognize that while "police power" cannot be definitely and briefly defined in such a way as to embrace all sets of facts that might face the courts, yet a general definition is epitomized in C.J.S. as follows:

"Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society, within constitutional limits." (16 C.J.S. Constitutional Law, Sec. 174)

If Section 11785 (129.060 R. S. Mo. 1949) is to be held within the police power, it certainly would be under "morals" or "the general welfare of society." But section 196 of C.J.S. Constitutional Law, tersely states "The exercise of the police power is subordinate to constitutional limitations thereon."

So far as we have been cited, or I have been able to find from an independent investigation, the first and lead-

ing case in the United States directly on this question is the case of People of the State of Illinois vs. Chicago, Milwaukee and St. Paul Railway Co. 306 Ill. 486, 138 N E. 155, 28 A. L. R. 610. An annotation at the end of that case in A. L. R. confirms my opinion that it is a case of first impression. In that case the Supreme Court of Illinois had under consideration a statute almost identical with the one before us except it permitted the employee two hours absence instead of four. That Court said:

"Under our state and Federal Constitutions every person is guaranteed the equal protection of the law in the right to own, use, and enjoy property. These Constitutions also distinctly provide that the property of no person shall be taken unless compensation be given to him for such invasion of his rights. Any law that deprives any person of his property or compels him to deliver to any person his property without justification, deprives him of property without due process of law. The section of the statute above quoted violates the provision of our Constitution aforesaid by providing, in substance, that no deduction from the usual salary or wages of the employee shall be. made by his employer on account of such absence, and by subjecting the employer to the penalty aforesaid in case he makes such deduction from the employee's wages. There is no justification or sound reason to be found in the law for making such a discrimination between an employer of labor and other persons who do not employ labor, and it likewise is a clear violation of the due process clause of the 14th Amendment to the Federal Constitution. The legislative branches of this government and of this state have gone to the utmost limits in legislation to protect the lives, health, and safety of employees, and the courts of this country, including this court, have also gone far in sustaining those laws wherever and whenever it reasonably appeared that such laws were necessary or beheficial in protecting the lives, health, and safety of such employees while at work, without regard to the question of cost to employers. The same courts have gone

equally far in sustaining laws that guarantee the equal and untrammeled rights of every citizen to exercise his right of franchise and to cast his vote at every election as he pleases and for whom he pleases, and without hindrance or undue influence of any kind by any person; but, so far as we know, no court has ever decided in any case that it was the right of any citizen, under any circumstances, to be paid for the privilege of exercising his right to vote, or to be paid by his employer for the time employed by him in the exercise of his right to vote. The statute in this cases in substance, requires employers of laborers to pay them for two hours' time while exercising their right to vote, and thus deprives such employers of their money and property without due process of law, and thereby denies them the equal protection of the laws, in violation of both the Federal and State Constitutions."

The State of Illinois in this case argued, as is argued here, that this statute was a valid exercise of the police power but that contention was considered by the court and it said:

"It is true that the state does have the right, under its police powers, to pass laws that tend to promote the health, safety, or morals of such employees as Turney, because of the fact that such laws would tend to promote the health, comfort, safety and welfare of society. The act in question, as contended by plaintiff in error, does not in any way, so far as we are able to see, tend to promote the health, safety, or morals of such employees. The provisions in question are not adapted to the object for which the law was enacted, and cannot be said to secure public comfort, welfare, safety, or public morals. There is no contention, and there can be none made with any reasonable showing, that the provision in question tends to promote the safety or health of any employee. It has always been the policy of our laws to condemn the idea of any voter being paid for exercising the privilege of an elector or voter. The right to vote is simply one of

the privileges guaranteed to every citizen of this country who possesses the requisite qualifications. It is not only a right, but should be regarded as a duty of the citizen, where he is reasonably able physically to perform that duty. It is not the constitutional right of any citizen to be paid for the exercise of his right to vote, and the holding of the provision of the statute void does not violate the right of any citizen, including those who are employed to labor. This provision of the statute is not sustainable under the police power of the state, and it does violate the constitutional provisions aforesaid, and therefore must be declared void. Besides, 'no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection' of the laws, and it should not 'override the demands of natural justice.""

In the case of McAlpine vs. Dimick, 326 Ill. 245, 157 N. E. 235, the question was again before the Supreme Court of Illinois and that court reaffirmed its doctrine in People vs. Chicago, Mil. & St. Paul Railway Co. Supra, saying:

"The provision of section 7, giving employees the right to absent themselves from their employment for two hours on election day for the purpose of voting without any deduction from their salaries or wages on account of such absence is also unconstitutional, being a violation of section 2, article 2 of the Constitution."

If it is was unconstitutional then, it is now. The Constitutional provision and the statute remain the same. A valid exercise of the police power cannot transcend the Constitution.

In Zelney vs. Murphy, 387 Ill. 492, 56 N. E. (2) 754, which was a suit for unemployment compensation, the court mentioned the case of People vs. Chicago, Milwaukee and St. Paul R. R. Co. and said:

"The statute there, as questioned, provided a penaltyfor any employer who made a deduction in wages for a period of two hours used by such employee in voting at any general or special election and the court held that it was not the constitutional right of any citizen to be paid for the time consumed in exercising the right to vote. The court further said: 'No exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property. due process and equal protection' of the laws. This holding was approved in McAlpine v. Dimick, 326 Ill. 240, 157 N. E. 235. However, this statute, re-enacted and amended from time to time, still contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."

The fact that the statute has been re-enacted and amended, placed and maintained, on the statute books and apparently never enforced, does not make it constitutional. The statute in this state was enacted more than 50 years ago and the fact that there are no decisions on it until now does not inferentially of otherwise tend to prove its constitutionality. More likely it proves that there has never been any attempt to enforce it. The case at bar seems to be the first one, as far as the books show, where this State has endeavored to punish an employer for refusing to pay an employee under these circumstances. And I can find no attempt on the part of any employee to collect such, as it appears to me, unrighteous compensation. I had rather believe that absence of precedent is due to the fact that the workers of Missouri have resented the legislative implication that they will not exercise that privilege of free men without being paid for it. I had rather think that in their scales the right to vote outweighs a few hours pay.

In Illinois Central Railway Company vs. Commonwealth, 305 Ky. 632, 204 S. W. (2) 973, the same question was up and that court held it unconstitutional both under the Kentucky Constitution and the Constitution of the United

States. As I read that opinion, it did not base its decision upon the People vs. Chicago, Milwaukee, St. P. R. Co. Supra, but after it had discussed the statute, its reasons for holding it unconstitutional, and then declaring its unconstitutionality under the Kentucky Constitution, it said this:

"We also believe that the wage-payment-for-votingtime provisions of this statute are antagonistic to the United States Constitution, particularly that provision which says that no state shall deprive any person of his property without due process of law or deny to any person in its jurisdiction the equal protection of the law.

"So far as we know, there has been only one case of this exact character decided by any court of last resort in the United States. The holding of that case was that such a law as this one now under consideration, passed by legislative authority in the State of Illinois, could not meet constitutional standards and must accordingly fall in the face of the fundamental restrictions of organic law. See People v. Chicago, M. & St. Paul Ry. Co., 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610."

It seems to me that this question here boils itself down to this proposition, can the legislature, without violating the provisions of the Constitutions, compel an employer to pay wages to his or its employee for four hours, or any other amount of times that he absents himself on election day and for which he gives his employer no service?

It is the duty of every good citizen to vote. On that day, and only then, he stands equal with every other citizen. Of course, the employer should not be permitted to deprive him of this duty by refusing to let him leave the place of his employment. To penalize him if he does is certainly a valid exercise of the police power and promotes the general welfare of the country in increasing the number of voters and thereby makes the questions to be determined at the polls represent the voices of a greater number. But to require the employer to pay him while absenting himself on election day (or for going to the polls to vote although the statute does not require that) does not promote the morals of the citizens but in my judgment, has the op-

posite effect. To pay a voter for going to the polls to vote is the first step toward corruptly influencing him to vote

a certain way.

What benefit does the employer receive by the employee voting that is different to the benefit that the voter himself receives or any third person interested in a fair expression of opinion at the polls? He benefits no more than anyone else, including the employee. It certainly does not indicate high morals on the part of a citizen to abstain from going to the polls unless somebody pays him, or unless he can do so without losing a small amount of wages. As a matter of fact, this employee, as most employees in this modern age of the eight hour day, had plenty of time either before going to work or after quitting time to cast his ballot without interrupting his service to his employer.

All good citizens should exercise the privilego of voting. It should be exercised voluntarily without any strings attached. He should desire on this day to be equal with all other citizens without any influence from any source except his own considered judgment of the candidates to be selected or the issues to be decided. If he receives pay for voting, he must feel a certain sense of obligation to the payor. It has always been the policy of a democracy to condemn the hiring of people to vote, to the end that the manner of marking their ballot would not be corruptly influenced.

It might be argued that it would be for "the general welfare" and foster more amicable relations between the employer and employee, if the statute is followed and the employer pays the employee. Such a feeling could be based only upon a sense of obligation which would restrict the free exercise of the right to vote according to one's own lights.

But it is more likely that the employee, so paid, would not attribute this benefaction to his employer but the enforcement of the statute would transmute loyalty to the employer into gratitude to the legislature. In either event, the result would not be beneficial to the general welfare.

It will be noted that this statute does not apply to certain elections, it applies to all elections and the only requirement is that it be an election in which the employee is "en-

The sole object of the Corrupt Practice Acts of the various states and nation is to procure a free expression in the voting booth. The voter should go there voluntarily and in theory, at least, express his honest convictions on the candidates and issues. He should not go there as the hired hand of his master on the time that his master is compelled to by for, in exercising his privileges as a citizen. To require his employer to pay him for voting or pay him for the absenting of himself from his job, so he may vote is, in my opinion, immoral in itself and at variance with this country's policy of free and unhampered elections. The general welfare of the state will be best conserved if the voter exercises his right to vote on his own time uninfluenced by the feeling that he is an employee in his master's service and on the payroll at the time he is doing that which he should only do as a citizen. This privilege should not be measured in dollars.

There are also cases which seem to hold that such statutes are justified as a valid exercise of police power. They are: People vs. Ford Motor Co. 271 App. Div. 141, 63 N.Y.S. (2) 697. Rouff vs. Bethlehem-Alameda Shipyard, Inc. (Cal. App.) 202 Pac. (2) 1059. Lee vs. Ideai Roller & Mfg. Co. 92 N.Y.S. (2) 276. Ballarina vs. Schlage Lock Co. (Cal.) 226 Pac. (2) 771.

The cases to the contrary in my opinion are not as well reasoned and logical as the ones above referred to.

In People vs. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2) 697, the Company was convicted and fined \$100.00 on each of three accounts for subjecting employees to a reduction of wages because of absence from work, while exercising the privilege of attending an election.

The majority opinion did not discuss the constitutionality of the statutes. It was discussed, however in a lengthy and well reasoned dissenting opinion by Lawrence, J., and at the close of that opinion, he said:

So far as any case has been brought to my attention and so far as I have been able to discover, no court has decided that it is the right of any voter, under all circumstances, to be paid for the privilege of voting. The statute here requires employers to pay their employees for two hours of time while exercising the right to vote, whether that is necessary or not, and thus deprives them of their property without due process and denies them the equal protection of the law, in violation of both the federal and state constitutions."

In Kouff vs. Bethlehem-Alameda Shipyard, Inc. (Cal. App.) 202 Pac. (2) 1059, the question before the court was the legality of the discharge of an employee because he had taken off time to serve as an officer of election on election day. It was held that the statutory requirement was not unconstitutional. The court cited and discussed People vs. Chicago, M. & St. Paul R. Co. supra and Illinois Central R. vs. Commonwealth, supra and said:

"It is interesting to note that both cases concede that that part of the statute requiring employers to allow time out to vote-2, hours in Illinois and 4 ig Kentucky-is a proper exercise of power. It was for a violation of the part requiring full pay that both railroads were prosecuted. Although those cases deal with time out for voting, while this deals with time out for election-board service, there is no essential difference between the statutory language in those cases and that of section 696 viz., 'nor shall any deduction be made from his usual salary or wages. However, it is not necessary for us to express any opinion as to the constitutionality of the part of section 695 just quoted. It suffices to say that it is clearly separable from the dismissal provision. See 12 Ca. Jur. PP. 643, 644. If the state can prevent employers from discharging employees because they serve on election boards, it follows that the complaint states a cause of action for . unlawful discharge."

In the case of Lee et al. vs. Ideal Roller & Mfg. Co. 92 N.Y.S. (2) 276, the cause was tried in the municipal court, Scileppi, Justice, presiding. The facts in that case were dissimilar to the one here. In that case an employee had worked 38 hours in a week and had been paid for 40 hours

because of two hours off on election day. He was then called upon to work 4 more hours on Saturday after he had only worked 38 hours but had been paid for 40. Under a Union contract for overtime above a 40 hour week, he was to receive time and one half. He contended that the two hours for which he was paid and did not work should . be counted in the 40 hour week so he could get time and one half for the full four hours worked on Saturda. His employer contended otherwise but Scileppi, Justice, held for the employee and rendered judgment against the defendant for the 4 hours worked on Saturday at overtime wages. No case is cited in the opinion as authority, no constitutional question was discussed and the only issue was whether to count the two hours that were paid for that were not worked in the 40 hour week so the full four hours on Saturday would be paid at the overtime rate. In its opinion, Scileppi, Justice, said:

It is conceded by the defendant that if the plaintiffs had actually worked eight hours on Election Day, with two additional hours off to vote, the plaintiffs would be entitled to two hours pay at overtime rate for that day."

This case is therefore not in point here.

In Ballarina vs. Schlage Lock Co. 226 Pac. (2) 771, the Appellate Department, Superior Court, City and County of San Francisco, California was considering a statute in all essentials the same as ours. This statute had been enacted in 1881 and until November, 1950 had never been before the courts. It permitted every voter at every seneral, direct primary or presidential primary election to be absent from his employment for two consecutive hours between the time of opening and the time of closing the polls. It provided that he should not be liable to any penalty "nor shall any deduction be made on account of any such absence from his usual salary or wages.", This case never pretended to separate the two elements of the statute, that is, the right to be absent and the right to be said. It merely stated that when persons enter into a contract, all material sixtutes affecting it are read into the contract by the law.

That, in the abstract, is a true statement but it has this exception, that it does not apply to an unconstitutional statute or part of one. The court then held that this statute taken as a whole was a valid exercise of police power and became a part of every contract entered into between employer and employee after its enactment.

I am not much impressed with the argument of appeliant about the loss of production. When it entered into its contract with the employee, whether actually written into it or not, that contract included the provisions of all valid material statutes. 17 C.J.S. Contracts, Sec. 330. When it contracted with its employee, if knew that on election days he was entitled to a leave of absence for four hours between the hours of opening and closing of the polls. In my judgment, that provision went into the contract, was a part of it, was a valid exercise of the police power and any loss occasioned by it because of the non-productivity of its plant was mothing about which it could complain. But to take money from the pocket of the employer whether it be \$2.40 for an hour and one-half or the same sum multiplied by the number of its employees, is taking the property of one segment of society and giving it to another without anything in return and this without considering the immoral aspect of paying an employee for exercising his privilege and duty to vote. That part of the statute was unconstitutional and did not become a binding part of the contract. People vs. Coler, 59 N.E. 716, 166 N.Y. 1, 82 Am. S.R. 605, 52 L.R.A. 814, Affirmed 67 N.Y.S. 701, 56 App. Div. 98. Cleveland vs. Clements Bros. Const. Co. 65 N.E. 885, 67 Ohio St. 197, 93 Am. S.R. 670, 59 L.R.A. 775.

In the case written by the St. Louis Court of Appeals (State vs. Day-Brite Lighting, Inc. 220 S.W. (2) 782) it was merely leld, as to the matter now in question before this court, that the information charged an offense under the statute. It construed the statute as it found it, and did not pretend to pass (as indeed it could not) upon its constitutionality. I have no disagreement with its holding that the right for an employee to absent himself from his employment, and the penalizing of an employer if he

prevented him from the "exercise of such privilege," is within the valid exercise of the police power of the state.

An employer is deprived of his property without due process of law and denied the equal profection of the laws if he is compelled to pay wages during the absent period, where no services for the employer is performed and where the period of absence is for the benefit and convenience of the employee. Such a violation of an employer's rights cannot be hallowed by the police power.

WILLIAM L. VANDEVENTER.

Judge.

CONKLING, J. concurs.

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IPREME COURT

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 317.

THE DAY-BRITE LIGHTING, INC., Appellant, vs.

STATE OF MISSOURI.

Appeal from the Supreme Court of the State of Missouri.

# APPELLANT'S STATEMENT, BRIEF AND ARGUMENT.

william H. ARMSTRONG and HENRY C. M. LAMKIN, Counsel for Appellant.

LOUIS J. PORTNER, COBBS, BLAKE, ARMSTRONG, TEASDALE & ROOS, Of Counsel.

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## SUPREME COURT OF THE UNITED STATES.

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Appellant,

VS.

STATE OF MISSOURI.

Appeal from the Supreme Court of the State of Missouri.

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11.

### DECISIONS OF COURTS BELOW.

A. State v. Day-Brite Lighting, Inc., 220 S. W. 2d 782, St. Louis Court of Appeals, 1949 (R. 25).

B. State v. Day-Brite Lighting, Inc., 240 S. W. 2d 886, Mo. Sup., 1951 (R. 37).

Ш.

### JURISDICTIONAL STATEMENT.

Jurisdiction of this Court was invoked under the provisions of Section 1257 (2), Title 28, United States Code Annotated, Chapter 646, 62 Stat. 929, which provides that

final judgment rendered by the highest Court of a state in which a decision could be had may be reviewed by the Supreme Court of the United States by appeal where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

Appellant's Motion for a Rehearing was overruled by the Supreme Court of Missouri on July 9, 1951 (R. 66). The Order Allowing Appeal was entered on August 14, 1951 (R. 73). This Court noted probable jurisdiction on November 5, 1951 (R. 75). Appellant has hitherto filed its printed Statement as to Jurisdiction.

#### IV.

## STATEMENT OF FACTS.

The Appellant, Day-Brite Lighting, Inc., was charged on June 25, 1947, in an information filed by the Prosecuting Attorney of the City of St. Louis, Missouri, with having violated the provisions of Section 11785, R. S. Mo. 1939. This statute, which since the 1949 revision of the Missouri statute has become Section 129.060, R. S. Mo. 1949, Vol. 1, page 1253 (the statute was not changed by the revision), reads as follows:

"Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty: provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to

any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

The information was in two counts. Count I charged that on an election day (November 5, 1946) the appellant refused to allow an employee, one Grotemeyer, who was entitled to vote in the election, to absent himself from his employment for a period of four hours between the opening and closing of the polls contrary to the provision of the statute. Count II charged that appellant penalized an employee, Grotemeyer, by deducting from his salary the amount of his earnings for the time he was absent from his work, and that Grotemeyer, an employee and qualified voter, was entitled to absent himself from his work and employment for four hours between the opening and closing of the polls without penalty of deduction of wages because of exercising such privilege, and that such penalty was contrary to the provision of the statute (R. 3-4).

Prior to the first trial appellant filed a Motion to Quash the Information on various constitutional grounds as more fully hereafter set out. The trial court sustained the Motion to Quash Count II and overruled the Motion to Quash Count I (R. 25).

The matter proceeded to trial on Count I, and the appellant was found guilty of failing to allow the said Grotemeyer, an employee who was entitled to vote, the privilege of absenting himself for a period of four hours from his scheduled work day (8:00 A. M. to 4:30 P. M.) on election day.

Appellant appealed from this conviction, and the State appealed from the Enstained Motion to Quash Count II of the Information. These appeals were taken to the Supreme Court of Missouri and there transferred to the St. Louis Court of Appeals. The reason for said transfer appears in the reported decision of the St. Louis Court of Appeals, State v. Day-Brite Lighting, Inc., 220 S. W. Reporter 2nd 782 (R. 25, 27 and 28).

The St. Louis Court of Appeals reversed outright the conviction of appellant on Count I, and also reversed the judgment quashing Count II of the Information and remanded the cause for trial upon Count II (R. 33).

After the matter was remanded to the trial court appellant again filed a Motion to Quash C unt II of the Information (R. 5), which the Court overruled on October 13, 1949. The matter then proceeded to trial upon an agreed Stipulation of Facts (R. 8, 9).

The facts as stipulated were, briefly, as follows:

Appellant was a Missonri Corporation, operating a plant in St. Louis, Missouri, engaged in production of goods that moved in interstate commerce (R. 9); that November 5, 1949, was a day for a general election in St. Louis and the State of Missouri; that the polls were open from 6:00 A. M. to 7:00 P. M. (R. 9); that appellant employed one Fred C. Grotemeyer, a duly qualified voter entitled to vote in said election (R.9); that he had been employed by appellant for some five years and was a member of Local No. 1, I. B. E. W., which had a contract with appellant covering wages, hours and other working conditions (R. 9); that at that time Grotemeyer worked a shift from 8:00 A. M. to 4:30 P. M. with thirty minutes off for lunch, and was paid on an hourly basis at the rate of \$1.60 per hour (R. 9); that the day preceding the election Grotemeyer requested a fourhour period from the scheduled work day the next day to

vote and such permission was refused (R. 9); that Grotemeyer, under the Union contract, was required to report
for work at 8:00 A. M.; that appellant furnished a set ofrules and regulations for its employees; that these rules
provided that no employee should be absent from work
without permission, except in cases of sigkness or emergency, and that then he must report such reason (P. 19);
that on the day preceding the election day appellant
posted a notice allowing all employees, including Grotemeyer, to take time off for voting at 3:00 o'clock in the
afternoon, which would be one and one-half hours earlier
than the said Grotemeyer regularly got off work and
which gave him four consecutive hours in which to vote
during the time the polls were open (R. 10).

The stipulation further set out that Grotemeyer lived about two hundred feet from the polling place in which he voted; that he left work at 3:00 o'clock; that he voted at about 5:00 o'clock in the afternoon, taking five minutes to do so (R. 10); that he wanted four hours from his scheduled work day to campaign, to vote, and to get out the vote; that four hours were not necessary; that it only took him sbont twenty minutes to get from his home to his work (R. 10); that Grotemeyer was paid by appellant on the day in question for only the six and one-half hours actually worked, namely, from 8:00 A. M. to 3:00 P. M., less thirty minutes for lunch; that he was not paid for the hour and a half from 3:00 P. M. to 4:30 P. M. ordinarily included in his scheduled work day, during which period he did no work for appellant, and that the plant could not operate if all employees were given four hours from the scheduled werk day to vote (R. 10).

The Stipulation continued that one Jacobs, International Vice President of the I. B. E. W., would testify as to the Union contract; that he had discussed on the day prior to the election, with appellant's representatives; the question

of Union members being allowed four hours off from their normally scheduled work day to vote and with pay for the time not worked (R. 10, 11); that Jacobs had been active in organized labor for thirty years; that he was familiar with its history in the State; that one of the desirable changes obtained by labor unions was a shortening and decrease in the number of hours worked per day (R. 11); that from his research the average work day fifty years ago in Missouri was 14 to 16 hours; that it had been at least 10 hours in his Union; that the average work day now was 8 hours, and that no lomand had ever been made by the Union before for four hours off of the scheduled work day on election day, with pay from appellant, prior to the election day in question (R. 11).

This was all the evidence on behalf of the State and Defendant demurred to the evidence, which the Court overruled (R. 21).

The Stipulation further showed that Klingsick, appellant's Vice President, Treasurer and General Manager, would testify on appellant's behalf that it had 158 employees working on an average harrly rate of \$1.089 from 8:00 A. M. to 4:30 P. M.; that 58 employees worked at an e average hourly rate of \$1.03 from 7:00 A. M. to 3:30 P. M. and 7 employees worked at an average hourly rate of \$.8646 from 7:00 A. M. to 3:00 P. M.; that if all employees took four hours off from the scheduled work day to vote their pay for that period would be \$951.42 and that appellant would have an additional production loss of \$7,138.00; that he wrote the rules and regulations for employees (R. 11), and that he had dictated the notice as to the time off the employees could take to vote (if they desired to absent themselves); and that the hour of 3:00 o'clock in the afternoon was arrived at because that time could give the employees four consecutive hours in which to vote before the polls closed (R. 11).

Concerning the two Union contracts Klingsick, by Stipulation, testified that the said Union contracts governed the relations between appellant and most of its employees; that under the contracts, wages were paid only for each hour worked at an hourly rate; that a work week consisted of 40 hours divided into five 8-hour days; that the employees contracted under the Union contracts to be on the job, ready for work at the scheduled starting time and to continue to work until the scheduled quitting time during the normal work day (R. 12).

It was also stipulated that Appellant would offer proof as to the financial loss to all employers in the State if all employees should be given four hours off with pay on election day. The Court having sustained the State's objection to this testimony, Appellant made an offer of proof showing that in Apr I, 1949, there were 330,600 hourly-paid employees engaged in the manufacturing industry, receiving therefor an average bourly rate of \$1.302 and that there were some 729,600 employees in non-manufacturing industries for which a figure, showing the hourly rate, was not available, and that those figures did not include agricultural employees (R. 12).

This was all the testimony on behalf of either party and at its close Appellant again demurred and the Court overruled the demurrer (R. 21) and found Appellant guilty as charged in Count II of the Information and fined it \$100.00 (R. 13). In due course, after the Court had overruled the Motion for a New Trial (R. 18), an appeal was taken to the Supreme Court of Missouri (R. 24).

Appellant toged in its Motion for a New Trial (R. 13) exactly the same grounds urged in its Motion to Quash the Information (R. 5). Those that need concern us here were briefly that the statute violated Section I of the Fourteenth Amendment to the Federal Constitution by depriving Appellant of his property without due process of law; that it

violated Section I of the Fourteenth Amendment by denying Appellant equal protection of the laws; and that it impaired the obligation of contracts in contravention of Section 10, Article I, or the United States Constitution. These contentions which are set out fully in the Argument are found in Paragraphs 3, 6, and 8 of the Motion to Quash the Information (R. 5, 6) and the same paragraphs of the Motion for a New Trial (R. 14, 15).

The matter was argued before Division 1 of the Supreme Court of Missouri with Appellant arging the Federal Constitution grounds above set out (R. 40, 46 and 47) and the Division upheld Appellant's Conviction (R. 35) and the Constitutionality of the Statute (R. 48).

On proper motion filed (R. 35) the matter was transferred to the Court en bane on Dec. 11, 1950 (R. 36). The Court en bane sustained the finding of Division 1 on June 11, 1951 (R. 36) and adopted the opinion as filed in Div. 1. The decision was 4-3 with 2 dissents written (R. 50, 53).

Thereafter, on June 26, 1951, Appellant filed its Motion for a Rehearing which was by the Court overruled on July 9, 1951 (R. 66). The Supreme Court on proper motion by Appellant stayed the filing of the mandate in the trial court pending this appeal (R. 66).

Appellant filed its Petition for Appeal to the Supreme Court of the United States from the Supreme Court of Missouri on Aug. 14, 1951, with the Clerk of the Supreme Court of Missouri together with its Appeal Bond, Assignment of Errors, Statement of Points to Be Relied Upon and Jurisdictional Statement. The order allowing the appeal was entered the same date (R. 73). Probable jurisdiction was noted by this court on Nov. 9, 1951, and the matter docketed for Argument (B. 75).

### SPECIFICATION OF ASSIGNME ERRORS.

Appellant filed on August 14, 1951, an Assignment of Errors with its petition of appeal (R. 70). This Assignment of Errors was adopted by Appellant as its Statement of Points to Be Relied Upon on October 15, 1951 (R. 74).

The specific errors assigned therein that are hereafter urged in this brief are as follows:

- "1. In said suit there was drawn in question the validity of a statute of the State of Missouri numbered 11785, R. S. Mo. 1939, Vol. II, page 3071 (the said section being then and there part of an Act known as the 'Corrupt Practices in Election Act' and the particular subsection, namely, Section 11785, R. S. Mo. 1939, being entitled 'Employees to be allowed four hours [to "vote]—penalty, etc.,' approved in 1897), on the grounds that it was repugnant to the Constitution of the United States and specifically Article I of the Fourteenth Amendment thereto, Section 10, Article I of said Constitution, and the Fifth Amendment thereto, and the decision of the Supreme Court of the State of Missouri was in favor of the validity of said statute, which decision is hereby assigned as error.
- "2. That the Supreme Court of Misseuri erred in holding and deciding that forcing an employer to give to an hourly paid employee morey for time not worked during his regularly scheduled work day, but time used by the employee so that the said employee would have the statutory four-hour period during the time the polls were open in which to vote, was not a deprivation of Appellant's property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

- "3. The Supreme Court of Missouri erred in holding and deciding that forcing one class of persons, natural or corporate, to pay a member of one special group of the electorate of the State of Missouri and of the United States, for time missed from his regular employment in order to vote, did not deny this Appellant equal protection of the law contrary to Section 1 of the Fourteenth Amendment of the United States.
- "4. The Supreme Court of Missouri erred in finding and holding that forcing one party to a contract to pay to the other party to a contract the hourly rate contractually agreed on between the parties to be paid for each hour the second party worked, even though the second party did not do any work during the period in question, was not an abrogation of the obligation of contracts in contravention of Section 10 of Article I of the Constitution of the United States."

#### ARGUMENT.

# A. The Current Status of the Challenged Statute.

Construing the opinion of Division 1 of the Supreme Court of Missouri as adopted by a 4 to 3 vote of the Missouri Court en banc (State v. Day Brite, 240 S. W. 2d 886), together with the opinion of the St. Louis Court of Appeals (State v. Day Brite, 220 S. W. 2d 782), we find that the Missouri Statute challenged in this Court now has the following meaning:

An employer, at his option, may designate any four consecutive hours on each and every election day during which the polls are open (6 A. M. to 7 P. M.) during which his employees entitled to vote in such election are entitled to absent themselves from their services and employment. If any part of that four-hour period as designated necessarily falls within the regularly scheduled work day, the employer must pay the employee for the time, so missed, that he would ordinarily work.

This is true, even in the case of employees contractually engaged to work by the hour at a contractually agreed hourly rate. This is true, even though, under the terms of the Union contract, the employer agrees to pay the employee \$1.60 for each hour the employee works, and the employee agrees to work for the employer one hour for each \$1.60 paid.

In the instant case, the employee, Grotemeyer, regularly worked until 4:30 in the afternoon. Appellant posted notices, as was its option, designating the four-hour period, from 3:00 P. M. to 7:00 P. M., as the period during which its employee who was entitled to vote would "be entitled to absent himself" from the sanvices or employment in which he was engaged or employed.

Grotemeyer left at 3 o'clock, and, hence, worked for appellant one and a half hence less on that day than he usually worked. Appellant, under the terms of its contract with Grotemeyer's Union, did not pay Grotemeyer for this ninety-minute period during which he performed no services for the company.

Under Jount 1 of the information in the case, as originally filed, the State contended that the Company violated the law, because it did not give Grotemeyer four hours' time off from his regular work day. Grotemeyer had requested from 12:30 to 4:30 (R. 10).

The St. Louis Court of Appeals (State v. Day Brite, 220 S. W. 2d 782) held the Company not guilty on this count, saying that any consecutive four hours' time during which the polls were open satisfied the requirements of that portion of the statute.

In the present case, the Supreme Court of Missouri has held that the appellant, by not paying Grotemeyer for the time from 3:00 to 4:30 P. M., violated the law, as set out in the questioned statute, in that it caused the employee Grotemeyer to suffer a "penalty or deduction of wages" because of exercising the privilege of absenting himself for four hours from his employment on election day.

The appellant, in its motion to quash the information filed in the trial court, in its motion for a new trial, filed in the trial court, in its assignment of errors and in its argument before Division 1 of the Missouri Supreme Court, in its motion to transfer the cause to the Missouri Supreme Court en banc and in its brief and its argument before the Missouri Supreme Court en banc and in its jurisdictional Statement filed in this Court, set out certain grounds in which it urged the statute was unconstitutional.

Appellant adopted its Assignment of Errors as filedein this Court (R. 70), in its Statement of Points to be re-

lied upon (R. 74). The identical grounds involving the Federal Constitution, as raised from the inception of this case, were urged in the Court below, and will be urged again here. They are, heel on toe, considered singly hereafter.

# B. The Statute Violates "The Due Process Clause".

In the "Motion to Quash Count 2 of the Information", filed in timely fashion in the trial court, we find:

13. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States, in that enforcement of the statute sought to be enforced by the information heldin—namely, Section 11785, R. S. Mo. 1939, will, under Count 2 of said information, deprive this defendant of his property without one process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States." (R. 5, 6.)

This was again urged by paragraph 3 of Appellant's "Motion for a New Trial" (R. 14), and uninterruptedly urged until the matter reached this Court. (R. 71.)

Appellant strongly contends that the statute in this particular case, under the decision of the Missouri Supreme Court, is depriving this Defendant and all other employers in a like situation of property without due process of law.

# 1. Appellant is fleprived of tangible property by this Statute.

It is deprived of tangible property, that is, money that it is forced to pay to its employees for work not performed and for which appellant receives nothing. The Stipulation shows that this amount is substantial. If all employees were granted four hours off with pay from the scheduled work day it would cost appellant in this case on every elec-

tion day \$951.42 by vay of pay to its employees and an additional sum of \$7,138.00 for loss of production. This would be a total of \$8,092.42 (R. 11). No doubt it will be argued that under the holding of the St. Louis Court of Appeals the loss to Appellant would not be four hours, but only one hour and a half. This would be the still substantial sum of \$3,033.52 lost to appellant by way of wages paid out for work not done and production time lost.

It is true that, in giving the four consecutive hours during the time the polls are open, for employees to vote, the production loss cannot be avoided, but when, in addition thereto, a state statute lays down a mandate that an employee must be paid by the appellant with Appellant's funds for time lost on election day when the employee may or may not exercise a citizen's duty, the Appellant is being deprived of tangible property without due process of law. No possible justification can exist for such a requirement.

In considering this case the Court perforce must bear in mind the impact upon all employers of hourly paid workers in the State of Missouri and the financial loss without due process to all such employers. Each hour allowed by the employers engaged in manufacturing industries alone in the State would deprive such employers of some \$425,000 of their money without due process (R. 12). When the hourly paid employees (729,000) (R. 12) engaged in non-manufacturing industries are added to this, it will readily be seen that the loss per hour for all employers of hourly paid workers in the State will amount to better than a million dollars per hour on each election day.

It is well to bear in mind that the statute is not limited to general elections or national elections or statewide elections, but applies to any election. This means that it applies to an election for a bond issue, an election of members of a school board, or a special election of a member of a city counsel, as fully as it does to an election of a

President or a Governor of a State. There were four elections in St. Louis in 1951.

2. Appellant is deprived of its property right to contract.

Freedom in the making of a contract for personal employment is an elementary part of the rights of personal liberty and private property, protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States. To this effect see Prudential Ins. Co. of America v. Cheek, 42 S. Ct. 516, 259 U. S. 530, 66 L. ed. 1044.

The right to make a reasonable contract is a natural property right that cannot be taken from one without did process of law. Yet this statute denies the Company that right.

# 3. Appellant is deprived of the fruits of its contract.

In addition to this right to contract of which Appellant is being deprived without due process of law in this case, it is being deprived of another type of property. This property is the intangible right of a person to receive the consideration due him under a contract. The right to occupy a building for a term of years under a contract; the right to walk across another man's property under the terms of a contract; the right to work for an employer and to receive the sum in compensation therefor provided by the contract are all property. In the instant case the employer has as its property a right, secured by contract, to an hour's work for each hour it pays its employees. Yet this statute says it shall not have, in the case of Grotemeyer (and all other of its employees entitled to vote), 1½ hours of work for which it must pay.

Appellant entered into the Labor agreements, as set out in the Stipulation (R. 11), receiving from Grotemeyer and

all its other employees belonging to the Union, the right to have them perform services for it and in exchange it had the obligation to pay them for each hour of work so performed. For the Legislature to declare under the law that the Defendant no longer has that right to receive the services of Grotemeyer for the money it must pay is to deprive the Company of property (i. e., its right under the contract) without due process of law, in contravention of the Constitution of the United States.

4. Private property is confiscated to another's enrichment.

The statute complained of has the direct effect of taking private property belonging to one citizen and giving it to another citizen without due process. Private property belonging to one citizen cannot be taken by Legislative enactment and be given to another citizen without due process regardless of how laudable the apparent objective may be.

"The taking by a state of the private property of one person or corporation, without the owner's consent, to the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States (Cases cited)." Mo. Pac. Railway Co. v. Nebr., 164 U. S. 403, l. c. 417, 41 L. Ed. 489, 495.

Undeniably that is the result reached in the instant case. Money belonging to the appellant must be forfeited by it to an employee who has done nothing to earn it and who is not entitled to it, or else appellant is guilty of an infraction of the statute here questioned. Its refusal to pay has resulted in a \$100.00 fine against it.

As Judge Siler states in Illinois Central Railway Company v. Commonwealth, 305 Ky. 632, 204 S. W. (2) 973:

"If we interpret the above constitutional provision correctly, it inhibits the legislative power of this state from arbitrarily passing a law taking property away from one person and giving it to another person-without value received or without any contractual basis. And this inhibition still stands, regardless of the merit or glory or value or need of the person on the receiving end of the transaction. Hardly a more worthy objective could be designed than that of building a great hospital for crippled children of all creeds and colors, a marvelous, public enterprise, and yet the constitution would not sanction a law saddling the burden of such an undertaking upon the farmers of Kentucky to the exclusion of its butchers, bakers and eandlestick makers. Such a law would constitute an exercise of arbitrary power over the property of that group of free men known as farmers. Its arbitrariness would lie in its unfairness and in its preferment. The law will not countenance a public maintenance of a private enterprise. Neither should the law demand a private maintenance of a public enterprise. Voting is a public enterprise. But if its maintenance is required by the employer group rather than by the entire, broad, general public, then that amounts to a requirement of private maintenance of a public enterprise." (Emphasis supplied.)

No reason can exist for forcing one segment of the electorate, namely, the employers of hourly paid workers, to pay another segment of the electorate, those same bourly paid workers, a compensation for exercising a right as intimately vital to the employee as to the employer.

The situation is even worse in the instant case in view of the fact that the employer has no means of ascertaining whether the employee is entitled to vote or whether he in fact closs vote. As previously pointed out, the statute does not require that the employee vote. It simply provides

that any person entitled to vote at an election shall be entitled to absent himself for four hours from his services during the time the polls are open on election day and shall not suffer any penalty or "deduction of wages" for so absenting himself.

Perhaps a subsidy of all voters from the general treasury. of the State of Missouri might be upheld. It might be possible to enact a valid statute that provided every voter should be paid \$5.00 at every election, from the treasury of the State of Missouri, for casting his ballot. We are informed that some countries less hampered by democratic ideologies have attempted legislation that would reward with cash payments from the public coffers, those citizens who vote. (Our informant did not say whether a voter got paid for voting for dog catcher or road commissioner, or whether he receives the same pay for voting for a United States Senator as for constable of Possum Walk Township.) At the other extreme are certain fascist-minded countries that nastily fine the voter (!) for not voting. (Query: Should the fine be higher for failing to vote for governor than Mayor?). Both extremes are utterly foreign to the American concept, but the Supreme Court of Missouri has held this statute is constitutional when it provides. that a certain segment of the voters shall be paid by another segment of the voters for absence from work on election day.

It would be a dangerous principle to permit a government, either state or federal, to subsidize voting. It is even more dangerous, more arbitrary and high-handed when a government attempts to subsidize a segment of the electorate by obtaining the funds to finance such operation by the discredited medieval experiment of taking money from one class and giving it to another. It is a startling propertion (stamped with the approval by the Missouri Supreme Court) that the citizens of Missouri are not in fact equal before the law, but that a subsidy from private funds should

be granted to a certain group of voters in order to enable them to receive pay for absenting themselves from their employment on election day whether they vote or not:

What price then:

"The freeman casting with unpurchased hand, The vote that shakes the turrets of the land"?

It is even a more glaring instance of deprivation of property without due process when one considers that the statute in question does not require in any of its terms that the employee shall in fact vote. Public welfare may not even receive the toga bought for it by the state with Appellant's coin.

5. The State usurps power in derogation of Appellant's vested rights.

Still an additional factor must be considered in analyzing how the employer is deprived of its property without due process of law. Article one, Section 2, of the Constitution of the United States provides the following:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature..."

### Section 4 provides:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or after such regulations, except as to the places of choosing Senators."

The Constitution thus delegated to the states a limited authority in elections of members of the House of Repre-

sentatives and the Senate (particularly after the enactment of the 17th Amendment). The legislatures of the several states have the authority to designate the time, place and manner of holding elections. Certainly the Constitution of the United States can designate time, place and manner of holding elections for Federal effices. The statute here attacked does not attempt to designate the time of holding elections. It does not concern itself with the place of holding elections. It is not addressed to the manner of holding elections.

"Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these." Newberry v. United States, 256 U. S. 232, 257, 65 L. ed. 913, 921.

Certainly a state statute that provides that in federal elections a certain group of the voters must be paid by another segment of the voters has no more to do with the manner of holding elections than the prerequisites mentioned above, and the Federal Constitutional grant to the State of Missouri, above noted, equally gives no right to the State of Missouri to control the shameful and newly conceived prerequisite of paying voters for time off taken on election day. The election in question was held on November 5, 1946, which the Court will take judicial notice was an election at which the members of the House of Representatives of the United States of America and a United States Senator were chosen (R. . . ).

Article One, Section 4 of the Constitution above quoted reserves to the Congress the power to make any regulations concerning time, place and manner of voting it deems necessary. The Congress has regulated the time of hold-

ing elections for members of the Congress by establishing the Tuesday next after the first Monday in November in every even numbered year as the day for the election of representatives. Title 2, U. S. C. A., Sec. 7. Section 1 of Title 2 provides that senators whose terms are expiring shall be elected on the last such election day immediately preceding the date of the expiration of their term.

This questioned statute was passed by the Missouri legislature as part of the Missouri "Corrupt Practices in Elections" Act (H. B. No. 273, Laws of Missouri, 1897) (R. 7, 48). Under the limitations of the Federal Constitutional grant to the Missouri legislature, and until abrogated by legislation passed by the Congress, the Missouri legislature can, in determining the manner of elections, provide against corrupt practices in holding such elections. with the manner of holding elections. It can even provide all qualified voters must be given an opportunity to vote. That is corollary to the manner. But a statute that maintains that a voter must be paid by someone else when he absents himself from his employment on election day (bearing in mind that there is no provision that the voter must vote in order to be paid) has no realistic relationship to preventing corrupt practices in an election or to the manner of holding elections.

"Not only does Sec. 4 of Article 1 authorize Congress to regulate the manner of holding elections, but by Article 1, Sec. 8, clause 18, Congress is given authority to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution. Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appro-

priate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution are constitutional. M'Culloch v. Maryland, 4 Wheat. (U. S.) 516, 421, 4 L. ed. 579, 605. United States v. Classic, 313 U. S. 299, 320, 85 L. ed. 1368, 1380.

The power attempted here to be exercised by the State of Missouri is not within the scope of the Constitution. The State of Missouri is limited to regulating the time, place and manner of holding elections. Paying hourly paid employees for the time they absent themselves from work on election day has no relationship to any of these three limitations. Appellant is deprived of property without due process of law when a state statute forces it to pay a \$100.00 fine (R. 18) because the state has usurped a power not granted to it in Federal elections by the Constitution of the United States.

("These Macedonians," said he, "are a rude and clownish people, that call a spade a spade.")

6. Police Power sicklied o'er with the pale cast of thought.

The Supreme Court of Missouri itself has admitted that this statute is a denial of due process.

"It is apparent that Section 11785 is violative of the due process clauses of both the Federal and State Constitutions unless its enactment is within the police power, of the state." (Emphasis supplied.) State v. Day-Brite, 240 S. W. 2d, l. c. 890 (R. 40).

It then examines the question of police power and after some discussion of the cases states:

"If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also." State v. Day-Brite, supra, l. c. 892 (R. 44). Police power has been exercised by the states in many situations. The Supreme Court of Missouri quotes with approval the following:

"Judge Cooley says that the police power of a state 'embraces its whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against the state but also to establish further intercourse of citizens with citizens those rules of good manners and good neighborfood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his wwn so far as is reasonably consistent with a like enjoyment by others,' and the courts have quoted this definition with approval many times. Finally it has been said that by means of this power the legislature exercises a supervision over matters involving the common welfare and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large." (Emphasis supplied.) (R. 43.)

This quotation, found in 11 Am. Jur., Constitutional Law, Section 247, pages 972, 973, supports appellant's contentions as fully as it supports respondent's. The employer votes on his own time or at least no expense to others. The employee votes on his own time or at least at no expense to others. This is reasonably consistent with insuring to each the uninterrupted enjoyment of, his own rights.

The appellant wholeheartedly endorses the Court's declaration, "The right of universal suffrage is the attribute of sovereignty of free people. We accept as a verity that 'eternal vigilance is the price of liberty.' For the wast

<sup>\*</sup> The court could perhaps also have recalled the admonition of Benjamin Franklin, 'They that can give up essential liberty to obtain a little temporary safety deserve neither liberty or safety." This is particularly apropos in view of the argument advanced in behalf of the economic welfare of the union laborer.

majority the only opportunity to exercise that vigilance is in the polling place." But nowhere does the could distinguish between a statute that guarantees the right to vote and a statute that guarantees the right to be paid for absenting one's self from one's employment on election day.

Appellant wholeheartedly accodes to the principle that every segment of the population employee or otherwise, should be encouraged to vote by guaranteeing to him an opportunity to vote. This is a democratic principle and is indeed a universal verity, but guaranteeing pay for exercising, not the right to vote, but the right of a qualified voter to absent himself on election day is as foreign to our political heritage as would be a ballot containing only one party with a large direle if the voter wishes to vote "da" and a much smaller circle in which to cast a fear-ridden "Nein" vote.

The court cannot be reasoning that hourly paid workers are more derelict in the exercise of their duty of voting than other segments of the electorate. This is an immoral assumption. If the statute has as its purpose the furnishing of an opportunity for the employee to vote, no pay an ecessary. The purpose of the statute is not to furnish an employee an incentive to vote. It is immoral to assume that employees in general, and the employees of the Day-Brite Company in particular, have to be subsidized as an incentive to discharge their duties or to participate in the election of men to office favorable to their interests.

Again quoting from the opinion in the Illinois Central Railway Co. v. Commonwealth, supra, we find:

"Voting is the privilege of a free people. One of its primary purposes is to keep people free. There is no such thing as a popular election in some countries of the old world:

"No group of people in America has a greater stake in its government, in its rocks and rills, in its woods and templed hills, than ordinary working men. No group in America can be more interested in voting for a clean, righteous, free statesmanlike government than that group known as workers. Let no man cease to thank his Cod as he looks in at the open door of his voting place, as he realizes that here his quantity, though cast in overalls, is exactly the same as the quantity of the President of the United States. There is a satisfaction and privilege in voting in a free country that cannot be measured in dollars and cents."

No one would venture to gainsay the right of a democratic state to secure to its citizens within proper limits the untrammeled privileges of exercising the franchise. Yet the Supreme Court of Missouri implies, nay, ordains, that in order to safeguard our democracy and to protect the political welfare of the state and its citizenry, qualified electors who are employed at an bourly rate shall receive pay for absenting themselves from work on election day.

It has created an immoral and unprecedented classification of voters. It has established a privileged caste of citizens hourly paid employees who shall be compensated by another artificial caste of voters, the employers, for the privilege of absenting themselves from work on election day.

"But to allow such an exception to be engrafted on the rights of national citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who work stigmatized by a State as digents, paupers, or vagabonds to be relegated to an inferior class of citizenship." Edwards v. California, 314 SU. S. 160, 181, 86 L. ed. 119, 129. (Emphasis supplied.) "Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded but is also a short-sighted blow at the security of property itself. Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights. Where those rights are derived from national citizenship no state may impose such a test, and whether the Congress could do so we are not called upon to inquire." Edwards v. California, 314 U. S., l. c. 185, 86 L. ed., l. c. 131. (Emphasis supplied.)

Appellant contends that there is a vast distinction between guaranteeing all an opportunity to vote, which is the American tradition, and guaranteeing pay without work to a favored few for absence from work on election day when such payment is repugnant to our whole basic form of government. Such legislation goes beyond those rules of good manners and good neighborhood insuring the uninterrupted enjoyment of a citizen's rights "so far as is reasonably consistent with a like enjoyment of rights by others," of which Judge Cooley speaks. Such legislation is arbitrary, unreasonable, unnecessary and immoral. Police power cannot excuse these invasions of the right of due process.

It has been shown that the legislation does not insure that anyone will vote and that it casts an unreasonable burden on the employer. To be upheld under the police power the legislation must further have a reasonable relationship to the object sought to be gained. The statute provides that an employee shall not suffer "any penalty or deduction of wages because of the exercise of such privilege (i. é., of absenting himself from his employment).

Appellant contends that the employee Grotemeyer did not suffer any deduction of wages. He was paid what he carned.

The words whose meanings we are here concerned with are "earnings," "salary," wages" and "deducting" or "deduction."

"The word 'earnings' means the fruit or reward of labor; the price of services performed." Pryor v. Met. St. Ry. Co., 85 Mo. App., 1. c. 372. (Emphasis supplied.)

"Earning." (1) Act or process of acquiring by labor or receiving as compensation, or that which is earned; esp. pl., wages. (2) Pl. econ. specif., any economic good to which a person becomes entitled for rendering economic services. These earnings are divided into wages in the ordinary sense paid for work directly productive and earnings (or wages) of management which are a return for the organization and direction of the work of others. Webster's New International Dictionary, 2nd Edition. (Emphasis supplied)

Earnings and wages appear synonymous.

"Evidently the term 'earnings' following 'salary,' 'wages' is used as meaning earnings of the same nature as those particularly specified, viz., salary or wages; that is remuneration to the employee for his services." Newman v. Rice-Stix Dry Goods Co., 73 S. W. 2d, I. c. 270. (Emphasis supplied.)

"The word 'wages' means 'that which is pledged or paid for work or services." State v. Weatherby, 168
S. W. 2d, l. c. 1049. (Emphasis supplied.)

"Wages—(1) Pay given for labor, usually manual or mechanical at short, stated intervals as distinguished from salaries or fees." Webster's New International Dictionary, 2d Edition. (Emphasis supplied.) "The word 'salaries' . . . includes 'salaries, wages and per diem of the officers, employees and other expenses." State v. Weatherby, 168 S. W. 2d, I. c. 1049.

"Salary—(1) The recompense or consideration paid or stipulated to be paid to a person at regular intervals for services." Webster's New International Dictionary. (Emphasis supplied.)

"Deduction is defined as 'that which is deducted; the part taken away; abatement.' "Pittsburgh Brewing Co. v. Dept. of Internal Revenue, 107 Fed. 2d, l. c. 1056.

"Deduction—(2) (a) Act of deducting or taking away; subtraction, as the deduction of the subtrahend from the minuend. (b) That which is deducted; the part taken away; abatement; as a deduction from the yearly rent." Webster's New International Dictionary, 2d Edition.

In connection with these foregoing definitions it is of interest to consider the definition of the common, ordinary word "reduction."

"Reduction—(1) A reducing or state of being reduced." ("Reduce—(2) To draw together; now, to diminish, esp. in bulk, amount or extent; as to reduce expenses.") Webster's New International Dictionary, 2d Edition.

By all the foregoing definitions, whether of "wages," "earnings" or "salary," the courts have uniformly held and the dictionaries have uniformly defined those words as meaning compensation for labor performed or services rendered. Under all the the evidence in this case the employee Grotaneyer rendered no services from 3 o'clock to 4:30 on the day in question by which he became entitled to any compensation therefor. He earned and was entitled to receive no "wages," no "earnings," no "salary." How

could this appellant have penalized the prosecuting witness by deducting something which he never earned and to which he never became entitled?

Further, under the definition, a "deduction" is a "taking away," If he never became entitled to "wages," "earnings" or "salary," it was impossible for the appellant to deduct such compensation. It is true that Grotemeyer suffered a "reduction" in the total amount his earnings would have been had he worked a full eight hours on the day in question, but his failure to work was his own voluntary act. The old maxim of "Volenti non fit injuria" could almost be applied.

The State has charged in Count Two that the defendant deducted from Grotemeyer's salary the amount of his earnings for the time he was absent from his work. If he was absent from his work he had no earnings; he was entitled to nothing. It is impossible for the defendant or anyone else to deduct anything from the sum total of nothing and thereby penalize the man who, not working, has earned nothing and has become entitled to nothing. Regardless of the validity of the Statute on Constitutional grounds, the meaning of the statute is clear. The Day-Brite Company caused this employee to suffer no deduction of wages. A reduction of wages was caused by the voluntary act of the employee in absenting himself. His wages were reduced by his failure to work the hours for which he would have been entitled to pay if he had been working. There is a vast difference in legal contemplation between a company deducting from wages illegally and a man by his voluntary act reducing the amount of pay which he would have carned if he had worked. Day-Brite Company docked no worke 's fixed periodic salary-it caused no forfeiture of wages to which Grotemeyer was entitled. Evidence of such acts would have violated the statute. Under the law and under the evidence no violation by the Company of the statute was shown.

The Supreme Court of Missouri upholding the conviction of the appellant under such circumstances was a denial of due process of law in depriving appellant of its property (by means of the \$100.00 fine) when the appellant in fact had committed no crime even if the statute were constitutional.

As stated supra, there must be a reasonable relationship between legislation and the object to be attained for police power to apply. There is no reasonable relationship between the time granted by the statute and the time necessary for the employee to vote. It is true that normally, the determination of the desirability of legislation is not for "judicial tribunals to avoid or vacate it upon constitutional grounds," 11 Am. Jur., Sec. 306, page 1089, but when the police power is being exercised in an unprecedented manner and in admitted violation of the right of due process, the reason and wisdom for it should be subject to scrutiny.

Gretemeyer's uncontradicted evidence (R. 10) shows that he did not need four hours to do his voting—that he needed and actually used just twenty minutes to go from his place of work to his home, which was only 200 feet from the polling place—that it only required five minutes to do his voting—a total of perhaps a bit more than twenty-five minutes all told.

He further testified that, although he was permitted by the employer to leave his work at 3:00 o'clock, he did not actually vote until 5:00 o'clock. So there were approximately two hours of time available to him before he voted and approximately two hours of time after he voted and he actually needed only five minutes to do his voting. None of the time he took from his regular work day (3:00 to 4:30 P. M.) was used or needed by him.

Then the complaining witness gave this bit of significant evidence—that he "wanted four hours from his employment, namely, from the noon hour on, TO DO CAMPAIGNING, to vote, AND TO GET OUT THE VOTE ..." (Emphasis ours.) (R. 10.)

Thus the announced intent and purpose of the complaining witness was primarily "To do campaigning" and to get out the vote." Approximately twenty-five minutes was needed to get to the polls from his work and to exercise his voting privilege, and having work at the usual time of 4:30 he could have voted and been home by five o'clock. The balance of the time "from the noon hour on" he wanted to campaign for votes and to get out the vote. This is when he wanted appellant to pay him for. This was appellant's violation.

At this point it is important to note that there is a material distinction between the privilege to vote on the one hand and the privilege of receiving pay so one can campaign and get out the vote on the other hand.

The privilege to vote is a privilege that should be fostered, and opportunity to vote should be afforded. Ample opportunity and time was afforded, to this complaining witness to exercise that privilege.

But he wanted more time for an entirely different purpose, "to campaign and get out the vote." Is that a privilege which it is incumbent on the state to foster and protect? Is that a privilege which an employer can be forced to subsidize by paying for work not done? The camel has not only moved into the tent, but he has brought his wife and mother-in-law with him.

We believe this court will recognize the material distinction between those two privileges, particularly in the light of the following facts, also from the stipulation of facts: At the time of the enactment of Section 11785, R. S. Mo., in 1897, "the average working day 50 years ago in the state was 14 to 16 hours," and the average working day now (1947) is 8 hours (R. 11).

Thus, when this action was sled in 1947, a worker was confined by his work only for about half as many hours each day as was the worker in 1897.

And this Court is aware of the fact that in 1897 there were no "good roads" and no automobiles, atom bombs or Hadacol. Access to polling places often was difficult and required much time in going to and from.

Thus, in the days before "good roads" and at times when the working day was 14 to 16 hours, there may have been some reasonable justification for a statute that afforded workers four hours while the polls were open in which to exercise his privilege to vote as the early November night fell on muddy, rutty rural roads or pale gaslighted city cobbles. That day is long gone.

This Court is asked to pass on this case in light of the conditions as disclosed in the record, fifty years later, in 1947, when we had good roads and automobiles, and when, as this record shows, the complaining witness actually needed only 25 minutes to exercise his right to vote and when labor unions at the height of their economic power flex their braway thews and bestride the narrow industrial, economic and political world like a Colossus.

The Missouri Court, in the majority opinion, cites with approval from the case of People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. 2d 697. The Appellate Division of the Supreme Court of New York said:

"An employer-employee relationship may be said to have in it such a power of dominance on the part of the employer as is capable of thwarting the wholesome exercise of the right to vote in an election." The

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fact that such abuses have occurred is historical'" (R. 42).

"May be said" by whom! By the U. M. W.! By the A. F. of L.! By the C. I. O.! By the I. B. E. W.! What person in modern industrial America where labor sits at every conference table—on every governmental committee—when it files a brief amicus curiae in every judicial controversy touching its real or imagined interests—what person, we reiterate, would make such an unrealistic statement! The power of dominance is rightly long gone with the "yellow-dog" contract. Labor no longer needs a wet nurse.

The Missouri Court cites West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703. It overlooks the fact that this Court in overruling Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, stated, "the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered" was reaponsible largely for its reversal. Neither the Missouri Court or the New York Court in the Ford Motor Case considered the question in the light of present economic conditions—economic conditions that have intervened since the Missouri Legislature passed the statute in 1897 to prevent corrupt practices in elections.

The New York statute provides for only 2 hours, excludes primary elections, and penalizes the employer by its terms only if the employee wants the time to vote. Even in the Ford Motor Case the employer did not exercise its "power of dominance" to prevent the employee from voting. It just didn't pay him for work he didn't do

Is there, in the light of these present economic conditions, any justification for a statute which forces an employer to pay a worker for four hours (or for any hours) of work not rendered in every election, in order that he may absent himself from work and may or may not exercise his own inherent privilege requiring only 25 minutes?

But, piling Ossa on Pelion, is there any reasonable justification for a statute which requires the employer of 1897, or of the present day, to pay a worker for work not rendered for four hours, so that the worker may exercise his privilege of campaigning and getting out the vote? That is the question and the situation presented to this Court in the present case.

Appellant strongly contends that the statute in this particular case, under the decision of the Missouri Supreme-Court; is depriving it and all other employers in a like situation of property without due process of law, and there is no feasonable basis for the exercise of police power to justify such deprivation.

We submit it is not reasonable to penalize appellant \$13.60 in order that Grotemeyer may earn \$2.40 "to campaign and to get out the vote". But the Missouri Court has justified the placing of this economic burden upon the employer as a valid exercise of the police power. It has justified it because the police power is frequently invoked to uphold so-called "labor legislation". The opinion mentions, among other types of legislation, workmen's compensation laws, unemployment compensation laws, semi-monthly payment of wage laws, minimum wage and hour laws, Sunday labor laws, etc. (R. 44.) It is important to note that in every one of the laws of that type, the legislative intent has been clear. For example, the Fair Labor Standards Act of 1938, as amended, states the following as its Findings and Declaration of Policy:

"Section 2 (a). The Congress finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers, etc." Pub. No. 718, 75th Cong., 3d Sess. (52 Stat. 1060), together with amendments thereto. 20 U. S. C. A., § 202.

The Fair Labor Standards Act is essentially and avowedly labor legislation, passed for the purpose of correcting certain evils that the Congress has found inherent in the body politic. It, and the other types of legislation cited in the opinion, were designed to eliminate certain evils existing in our economic system which were detrimental to the health, efficiency and general well-being of workers and, hence, offered a threat to the economic and physical welfare and safety of the public in general.

Denial of pay for absence, not needed but desired "to campaign and get out the vote" presents no threat to the health, efficiency and general well-being of workers. It is not even a threat to the economic welfare of the hourlypaid laborer. Nine hundred and fifty Union men walked out at the Oakridge Atom Plant recently because of the lay-off of eight men. They picketed the plant, and production of vital defense weapons ground screechingly to a halt. It caused great economic loss to every union man in the plant.. But it was their personal right to strike, and they wittingly accepted the economic loss to uphold their personal right guaranteed to them by the law. It is equally their personal right to vote, and equally they should accept the economic loss involved in upholding this personal right. But here no economic loss is neces-. sary-only an unmerited economic advantage-the ageold indolent's dream of something for nothing is sought.

One fears that when the Missouri Court speaks of economic welfare and police power

"Inclination snatches at arguments

To make indulgence seem judicious choice."

Paradoxically, in upholding the constitutionality of this statute in an attack from another quarter the opinion of the Missouri Court has shown conclusively that this is not and cannot be labor legislation. In discussing the constitutionality of this statute under Section 23, Article III, Missouri Constitution of 1945, the Court said:

"In essence, therefore, the employer who practices the acts condemned by the statute, as did the defendant, is guilty of 'corrupt practices in elections,' which is the first definitive phrase of the original act' (R. 49).

The Missouri Court has held that this statute is an amendment to "An Act to prevent corrupt practices in elections," and hence the title of the original act was sufficient to embrace the provisions of this statute contained in the amendatory act. If the clear intendment of the statute was to prevent corrupt practices in election, this act cannot be justified as labor legislation designed to promote the economic welfare of employees and so subject to the exercise of police power and here justify placing a burden on the employer.

If the legislative intent was to secure free and open elections so that our democracy could be upheld, the reasoning advanced by the Court as applicable to labor legislation, such as has sustained minimum wage laws and other labor legislation, cannot sustain the validity of this statute. The statute is either fish or fowl or good red herring—a statute should not be endowed with the attributes of Proteus.

## C. The Statute Denies Equal Protection of the Laws.

Point 6 in appellant's Motion to Quash Count II of the information filed in timely fashion in the trial court provides the following:

"That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of

the United States in that the enforcement of the statute sought to be enforced by the information herein, namely, Section 11785, R. S. Mo. 1939, will under Count II of said information deny to this defendant equal protection of the laws in violation of Section 1 of the 14th Amendment of the Constitution of the United States' (R. 6).

This point has been carefully preserved throughout the proceedings in this cause in the same manner that the point involving due process of law, supra, was preserved.

In Section 1 of the Fourteenth Amendment to the Constitution of the United States it is provided that: "No State shall deny to any person within its jurisdiction the equal protection of the laws." This has been construed to mean that a statute would be unconstitutional which selects oparticular individuals or a group of individuals from a class and subjects them to rules different than those to which other members of the class are subjected or imposes upon them special obligations or burdens from which others in the same class are exempt. See Cooley, Constitutional Limitations (6th Ed.), 556.

Article 8, Section 2, of the Constitution of Missouri, 1945, provides what the qualifications of voters of the State of Missouri shall be—in brief, all citizens of the United States over the age of 21 who have resided in the state one year and in the county, city or town 60 days before the election are entitled to vote. The State of Missouri under the Constitution of the United States has the right to fix the qualifications of voters within its boundaries. In a general Federal election, such as this one was, the electors, so says Section 2 of Article 1 of the Constitution of the United States, "of each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Those qualifications are as set out above by the Constitution of the State of Missouri for 1945.

The group of residents of the State of Missouri forming the electorate includes within its membership men and women, members of the white race and members of the colored race, the millionaire and the village bum, and most significantly for the purposes here under discussion, the employer and the employee. We are considering here only the citizen's right to vote, or his right to an opportunity to vote, or in the final analysis, his right to be absent from his place of employment (if he happens to be an employee) on election day with pay.

The Constitutions of the United States and of the State of Missouri make no distinction, economically, socially, racially, or in any other regard, between classes of voters. All voters belong to one class. When, therefore, state legislation is held by the highest court of a state to mean that one segment of the voting citizenry must pay to another segment compensation for absence from their employment on election day, such provision is discriminatory and denies the employer equal protection of the laws. Police power does not extend this far.

Employers comprise a segment of the electorate that in an economic grouping would be classified as a subdivision of that economic grouping engaged in free enterprise.

"Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law'; 'This is a government of laws and not of men'; 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment (sic, 14th) were not content to depend on a mere minimum secured by the dre process clause, or upon the spirit of equality which might not be insisted upon by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was simed at ufidue favor and individual or class privilege on the one hand and at hostile discrimination or the oppression of inequality on any other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.

"Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right is just as clearly a denial of equal protection of the laws to the latter class as if immunity were in favor of, or the deprivation of the right permitted worked against, a larger class. (Emphasis supplied.)

"Mr. Justice Matthews, in Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220, 226, 6th Supreme Court Reporter 1064, speaking for the court of both the due process and equality clause of the 14th Amendment, said:

'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'

Truax v. Corrigan, 257 U. S. 312, 332 and 333, 66 L. Ed. 254, 263.

Attention is called to this court's pronouncement that the guaranty was intended to secure equality or protection for all similarly situated. When the question of voting arises, all people qualified to vote are "similarly situated." Voters cannot be classified into groups such as those who own cars and those who walk, those who wor-

ship God and those who worship Mammon, has who drink bourbon and those who drink tea.

The statute in question does not accomplish its purpose in a reasonable manner so as to warrant police power justifying the classification of voters into one group that employs laborers and another group that labors.

Appellant states that it is not a reasonable classification for the further reason that employers are afforded no protection against petty chiseling by the thousands of employees who are entitled to vote and absent themselves on election day and do not vote. They must be paid. It does not afford employers protection against the chiseling by thousands of employees who are not entitled to vote but who absent themselves from their employment on election day and demand pay for the time missed. There is no method by which the employer can ascertain the eligibility of his employee to vote. Indeed, the statute does not even require that the employee, even though receiving pay, shall gote. 'It only requires that the employee be allowed the privilege of absenting himself from work. Even in the absence of all other co. siderations, forcing an employer to pay an employee entitled to vote for absenting himself from his employment and not voting would be both a demad of due process and of equal protection of the laws.

The opinion of the Supreme Court of Missouri justified the statute by an extension of the police power unprecedented in Missouri and in the United States. It extends police power into the field of political welfare. Even such an extension of police power (the statute is admittedly unconstitutional absent that extension) cannot stretch its newly fledged attributes to gover forced payment to an employee not entitled to vote or to an employee who does not vote. Liberty they cry when they mean license.

At it be argued that it is to the appellant's interest that all voters vote and the protection of that interest is a fair

compensation to the appellant, the foregoing shows that the appellant is not even guaranteed directly or indirectly that ephemeral consideration. Nor does such argument take into consideration at all the undoubted facts that it is equally to the employee's interest that all voters vote, and that the employer is denied equal protection of the laws when a special burden is placed on his shoulders to secure a result equally desirable to all:

The statute denies equal protection of the laws to this appellant because nowhere by its terms does it secure to it any assurance that the clear intendment of the statute would be effected. If the statute had stated in plain terms every employee must be given time off on election day whether he voted or not, its unconstitutionality would stand confessed. That, it is submitted, is the effect of the present statute. No safeguard is afforded this appellant or any other employer that it will not be forced to pay far beyond the bounds attempted to be fixed by the statute. A statute with these defects cannot be constitutional either under due process, equal protection of the laws or the aegis of police power.

The Supreme Court has enunciated a well recognized principle that it is not its province to determine the wisdom or adequacy of a statute in passing on its constitutionality (R. 45). Appellant does not stand before this Court attacking either its adequacy or wisdom. Appellant urges that regardless of either inadequacy or foolishness there is now no reasonable relationship between the statute presently on the books and the end sought to be obtained to justify the exercise of police power. Police power, even by the "political welfare" measuring stick, newly enunciated in one Missouri epinion, cannot extend to forcing an employer to pay an employee for time taken off on election day when the employee is either not entitled to vote or does not vote. No more clearly could one be deprived of equal protection of the laws.

The right of employees to vote should be protected, but the steps taken to secure that protection must not unreasenably infringe upon the rights of another group of voters. The classification made by the statute is an arbitrary one extending far beyond the reasonable need or purpose behind the statute. Its constitutionality cannot be sustained when it so patently denies appellant equal protection of the laws.

### D. The Statute Impairs the Obligation of Contracts.

Paragraph 8 of appellant's Motion to Quash Count H. of the information filed in timely fashion in the trial court reads as follows:

That said Section 11785, R. S. Mo, 1939, is invalid and unconstitutional and contrary to the provisions of the Constitution of the Hauss States in that the referencement of said spatial under Count II of said information will impair the obligation of contracts in violation of Section 10, Article I, of the Constitution of the United States." (R. 6).

This point was preserved throughout the proceedings in this matter in the same manner as the point raised concerning due process of him was preserved. Section 10, Article I, of the Constitution of the United States, provides in part:

"No state shall pass any bill of attainder," ex post facto law or law impairing the obligation of contracts . . " (Emphasis supplied.)

The employer-employee contract has, of recent years, become a highly specialized and comprehensive document. Every minute detail of the Agreement by the employees as to what their rights are to be and what are their obligations as well as the duties, obligations and rights of the employer, are carefully spelled out in these so-called Charter Agreements.

The thing the employer received by the contract was the right to have employees work for it on specified days and at specified hours. In exchange for that right, the employer obligated itself to perform a great many things—such as to employ only union members, furnish various facilities, to pate a certain scale of twages, on an hourly basis for each hours work performed holidays, etc. There is no employer by anyone that the employer did not fully deceased the obligations under the contract; but this later would deny to the employer the rights guaranteed to him under the contract.

Theorizing for a moment, no one would hesitate to denounce the employee who, having entered into an agreement such as the one here present, while holding the emthe exact terms of the contract reported for duty, hot as the contract specified but at sich times as the employee chose to work, That would be a clear viola. tion by the employee of the obligations he assumed when his Union representative executed the contract. As a matter of fact, absenteeism is one of the great causes of industrial inefficiency and is a basic reason for any employer signing a Union Contract. If the employee could not refuse to work in accordance with the terms of the contract without abrogating his obligations thereunder, it isompossible to see how a State can then pass a law which effects the same result. Yet, when the Missouri Court declared this defendant guilty of violation of Section 11785, the Court clearly accomplished that result. The statute goes even further and requires the employer to pay the employee for hours not worked, whereas, under the contrust the dolipany was obligated to pay Grotemeyer \$1.60 for each hour worked, or conversely, Grotemeyer was entitled to receive (1.60 per hour only for hours worked. This statutory requirement is as much an impairment of the obligations of a contract as if the employee had done it rather than the statute accomplishing the same result.

The Supreme Court of Missouri has held in its opinion that the statute is justified in impairing the obligation of contracts. It bases that pronouncement on the opinion of the Missouri court in Gideon-Anderson Lumber Co. v. Hayes, 348 Mo. 1085, 156 S. W. 2d 898, from which it quotes as follows:

"The power of Government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests." (Emphasis-supplied.) (R. 47.)

A most careful reading of the union contract fails to disclose how it is reasonably calculated to injuriously affect the public interests. It is a standard contract providing in somewhat lengthy ferms the conditions of employment, including the rate of pay for work performed. A contract providing that Grotemeyer shall receive \$1.60 for each house worked spottigeren conceivably brigariously affect the public interests. Assuredly contracts may by regulated so as to require statable protection of health, safety, minimum. working conditions and pay. They can be regulated to prevent oppression, but the present statute is aimed at none of these things. Unregulated, the contract here involved cannot affect the public welfare, health, morals or interest. It simply fixed the terms of employment of Grotemeyer. He is to work one hour for which he is to be paid \$1.60. To take money from the employer and give it to Grotemeyer for work he does not perform relieves the employee of the obligation of his contract and abrogates the appellant's contractual rights without justification and in derogation of the Constitution of the United States.

Since the exercise of the vote is a privilege guaranteed to every citizen of this country, every citizen has not only a right but a duty to exercise a vote. The employee's interest in Government ought to be great enough for him to vote without subsidization therefor by his employer and at his employer's expense. It is not reasonable to say that an employee in the discharge of a moral civic duty, and while exercising a legal right, must do it at his employer's expense and to the impairment of his working agreement. "Where a statute manifestly varies the contractual obligation between an employer . . . employee, it must be based on some valid and necessary exercise of the police power of the State and not be an arbitrary restriction." State v. Savings & Building Association, 167 Mo. 489, 67 S. W. 215.

Evidence worthy of notice is found in paragraphs 11, 12 and 13 of the Stipulation wherein Jacobs; one of the interpretation of the State, disclosed with observable was a studied plan to use this Statute of 1897 to exact pay for work not rendered—a premaditated plan to get something for nothing (R. 11).

Jacoba was International Vice President of the International Brothermon of Electrical Workers and had been active to the first for 30 years (R. 10, 11).

demand on this employer for four hours off with pay (R. 11), and yet "on the day prior to the election he had discussed with Mr. Wilks, Plant Superintendent for the Defendant, the question of union members being allowed four hours off from their normal work day, with pay for the time not worked, for the purpose of voting during the election" (R. 10). (Emphasis supplied.)

Then on the same day Grotemeyer, a member of the union, "requested permission... from one Wilks, Plant Superintendent for the Defendant, to absent himself for a period of four hours from his scheduled work day the next day to vote, and that Wilks refused him such permission" (R. 9).

With only 25 minutes actually needed for voting, what purpose was in mind except an effort to make the employer pay for the time not used in productive work for his employer, but for time this union man wanted to use in campaigning and getting out the vote?

As heretofore shown, the prosecuting witness admitted that this was his purpose, that he wanted time off from noon on, for that purpose. He wanted four hours pay from his employer for campaigning and getting out the vote.

And, in the concerted pulon effort, the purpose was to secure pay for all union employees for work they did not do.

This is not an attack upon unions as such. It is an impeachment of the motives of a few men belonging to a particular union. They are making an unblushing effort to escape the solenin obligations of their contract, namely, to work one bour for each hour sipax received, and they appeal to the authority of this Court to mid there is that evid sipa of their courtestial duties. The highest court in this preatmentally is bould not countenance such an attempt, and, under a broad or narrow interpretation of Section 10. Article I, of the Constitution of the United States, this Court cannot countenance such an attempt.

No valid exercise of the police powers of the State can be found in arbitrarily saving that regardless of a contract, work not done on an election day must be paid for, because the employee would have earned the amount sought if he had worked and had not chosen to absent himself to campaign, to vote and to get out the vote.

As Judge Vandeventer said in his dissenting opinion in State v. Day-Brite, supra, l. c. 902:

"When it entered into its contract with the em-

contract included the previsions of all valid material statutes. 17 C. J. S., Contracts, Section 300 . . . but to take money from the pockets of the employer, whether it be \$2.40 for an hour and a half or the same sum anultiplied by the number of its employees, is taking the property of one segment of society and giving it to another without anything in return, and this without considering the immoral aspect of paying an employee for exercising his privilege and duty to vote. That part of the statute was unconstitutional and did not become a binding part of the contract." (Emphasis supplied.) (R. 65.)

A contract would be valid if it provided that on election day an employer would pay the employee double time for the time hashofied be entitled to absent himself instead of single time if he took the time off. The employee could waive the right. If he does not apply for time off but works, the employee is not in violation. It is not compulsory on the part of the employee to take the time off. If he is a conscientious employee who believes in working for money earned and does not want to be beholded to anyone if he is paid double time to work instead of taking the time off, he has waived the provision of the employee. He can take the time off—or he can work at the contractual rate or double the contractual rate—there is no compulsion on him to vote or even take the time off.

Legislation from provided an employee and to take the time off without pay to vote would be class legislation. It is equally class legislation when the employer has to pay the employee for taking time off on election day.

One is not unmindful of the argument that all valid statutory provisions are included in a contract whether actually written into the contract or not. That argument applies equally to both contracting parties. It applies

here to the employee as well as the employer. Since the provisions of the statute could be waived (e. g., the employee could have received double pay or stayed and worked), when the contract was silent on the question, the right to receive pay (if such a right ever existed) was waived. The state now seeks to engraft upon the contract & something other than the contracting parties agreed on and had a right to agree on. (They could have agreed that on election day union members should report two hours early so that four hours would remain at the end of the day before the polls closed. Such an agreement would have been valid.) There is no provision in the statute making illegal a contract such as these mentioned. Missouri Court voids part of the contract as written. This, it is submitted, it cannot constitutionally do under the facts in this case without abrogating the obligation of contracts.

#### E. Decisions in Other States.

To date four states other than Missouri have had some phase of the present question passed on by their lighest appellate court of appellate court of appellate court of appellate furisdiction.

Some sixteen states make it unlawful for employees to be docked under varying circumstances. Colorado and Utah specifically exempt hourly paid employees from operation of the statute. Six other states provide for absence of employees on election day with no provision for payment of wages. (See Table in C. C. H. Labor Law Journal, May, 1950.)

The four states who have passed in some degree on the question are Illinois, Kentucky, New York and California. The cases that should be considered are as follows:

People v. Chicago, Mil. & St. P. R. R. Co., 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610;

McAlpine v. Dimick, 326 Ill. 245, 157 N. E. 235;

International Shoe Co. v. Caldwell, 305°Ky. 632, 204 S. W. 2d 973, Cert. den. 92 L. Ed. 1767, 334 U. S. 843, 68 S. Ct. 1511;

People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2) 697:

Kouff v. Bethlehem-Alameda Shipyard, Inc. (Cal. App.), 202 Pac. 2d 1059;

Lee v. Ideal Roller & Mfg. Co., 92 N. Y. S. (2) 276; Ballarina v. Schlage Lock Co. (Cal.), 226 Pac. (2) 771.

The two Illinois cases and the Kentucky case seem squarely in point factually with the present case. Rarely is a litigant's cause aided so pertinently and absolutely by judicial pronouncement as this appellant's position is aided by Judge Vandeventer's dissent from the holding of the Missouri Court. He analyzes those three cases in a manner far superior to any attempt by this appellant to do so.

He states:

to find from an independent investigation, the first and leading case in the United States directly on this question is the case of People of the State of Illinois v. Chicago, Milwaukee and St. Paul, Railway Co., 300 Ill. 486-138 V. F. Kia, 28 A. L. R. 610. An apportation at the end of finit case in A. L. Ri confirms my opin for that it is a case of first impression. In that case the Supreme Court of Minois had under consideration a statute almost identical with the one before us except it permitted the employee two hours absence in stead of four. That Court said:

"Under our state and Federal Constitutions every person is guaranteed the equal protection of the law in the right to own last, and enjoy property. These Constitutions also distinctly provide that the property of no person shall be

saken unless compensation be given to him for such invasion of his rights. Any law that deprives any person of his property or compels him to deliver to any person his property without justification deprives him of property without due process of law. This section of the statute above quoted violates the provision of our Constitution aforesaid by providing, in substance, that no deduction from the usual salary or wages of the employee shall be made by his employer on account of such absence, and by subjecting the employer to the penalty aforesaid in case he makes such deduction from the employee's wages. There is no justification or sound reason to be found in the law for making such a discrimination between, an employer of labor and other persons who do not employ labor, and it likewise is a clear violation of the due process clause of the Fourteenth Amendment to the Faderal Constitution tion. The legislative branches of this government and of this state have gone to the utmost limits in legislation to protect the lives, health. and safets of employees, and the courts of this country including this court, have also gone far in sustaining those laws wherever and whenever it reasonably appeared that such laws were mecessary for beneficial its protecting the lives, health, and safety of such employees while at work, without regard to the question of cast to employers. The same courts have gote equally far in sustaining laws that guarantee the equal and untrammeled rights of every citizen to exercise his right of franchise and to cast his vote at every election as he pleases and for whom he pleases, and without bindrance or undue influence of any kind by any person; but, so far as we. know, no court has ever decided in any case that

it was the right of any citizen, under any circumstances, to be paid for the privilege of exercising his right to vote, or to be paid by his employer for the time employed by him in the exercise of his right to vote. The statute in this case, in substance, requires employers of laborers to pay them for two hours' time while exercising their right to vote, and thus deprives such employers of their money and property without due process of law, and thereby denies them the equal protection of the laws, in violation of both the Federal and State Constitutions.'

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"The State of Illinois, in this case argued, as is argued here, that this statute was a valid exercise of the police power but that contention was considered by the court and it said:

'It is true that the state does have the right, under its police powers, to pass laws that tend to promote the health, safety, or morals of such employees as Turney, because of the fact that such laws would tend to promote the health, comfort, safety, and welfare of society. The act in question, as contended by plaintiff in error, does not in any way, so far as we are able to see, test to promote the health, safety, or morals of such emprovees. The provisions in question are not adapted, to the object for which the law was enacted, and carried be said to secure public comfort, welfare, safety, or public morals. There is no contention, and there can be none made with any reasonable showing, that the provision in question tends to promote the safety or health of any employee. It has always been the policy of our laws to condemn the idea of any voter being paid for exercising the privilege of an elector or voter. The right to vote is simply one of the

privileges guaranteed to every citizen of this, country who possesses the requisite qualifications. It is not only a right, but should be regarded as a duty of the citizen, where he is reasonably able. physically to perform that duty. It is not the constitutional right of any citizen to be paid for the exercise of his right to vote, and the holding of the provision of the statute void does not violate the right of any citizen, including those who are employed to labor. This provision of the statute is not sustainable under the police power of the state, and it does violate the constitutional provisions aforesaid, and therefore must be declared void. Besides, "no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection" of the laws, and it should not "override the demands of natural instice."

"In the case of McApine v. Dimick, 326 Ill. 245, 157 N. E. 235, the question was again before the Supreme Court of Illinois and that court reaffirmed its doctrine in People v. Chicago, Mil. & St. Paul Railway Co., supra, saying:

"The provision of section 7, giving employees the right to absent themselves from their employment for two hours on election day for the purpose of thing without any deduction from their salaries of wages on account of such absence is also unconstitutional, being a violation of section 2, article 2 of the Constitution."

"If it was unconstitutional then, it is now. The constitutional provision and the statute remain the same. A valid exercise of the police power cannot transcend the Constitution.

"In Zelney v. Murphy, 387 Ill. 492, 56 N. E. (2) 754, which was a suit for unemployment compensation, the court mentioned the case of People v. Chicago, Milwaukee and St. P. R. R. Co., and said:

The Ratute there, as questioned, provided a penalty for any employer who made a deduction in wages for a period of two hours used by such employee in voting at any general or special election and the court held that it was not the constitutional right of any citizen to be paid for the time consumed in exercising the right to vote. The court further said: "No exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process and equal protection" of the laws. This · holding was approved in McAlpine v. Diraick. 326 III. 240, 157 N. E. 235. However, this statute, re-enacted and amended from time to time, still, contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. These cases, of course, could not be entrolling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding, ground for a rational compromise between individual rights and public welfare.

"The fact that the statute has been re-enacted and amended, placed and maintained, on the statute books and apparently never enforced, does not make it constitutional. The statute in this state was enacted more than 50 years ago and the fact that there are no decisions on it until now does not inferentially or otherwise tend to prove its constitutionality. More likely it proves that there has never been any attempt to enforce it. The case at bar seems to be the first.

one, as far as the books show, where this State has endeavored to punish an employer for refusing to pay an employee under these circumstances. And I can find no attempt on the part of any employee to collect such, as it appears to me, unrighteous compensation. I had rather believe that absence of precedent is due to the fact that the workers of Missouri have resented the legislative implication that they will not exercise that privilege of fee men without being paid for it. I had rather think that in their scales the right to vote outweighs a few hours pay.

"In Illinois Central Railway Company v. Common-wealth, 305 Ky. 632, 204 S. W. (2) 973, the same question was up and that court held it unconstitutional both under the Kentucky Constitution and the Constitution of the United States. As I read that opinion, it did not base its decision upon The People v. Chicago, Milwaukee, St. P. R. R. Co., supra, but after it had discussed the statute, its reasons for holding it unconstitutional, and then declaring its unconstitutionality under the Kentucky Constitution, it said this:

"We also believe that the wage-payment-for voting-time provisions of this statute are antagonistic to the United States Constitution, particularly that provision which says that no state shall deprive any person of his property without due process of law or deny to any person in its jurisdiction the equal protection of the law.

"So far as we know, there has been only one case of this exact character decided by any court of last resort in the United States. The holding of that case was that such a law as this one now under consideration, passed by legislative authority in the State of Illinois, could not meet constitutional standards and must accordingly fall in the face of the fundamental restrictions of organic

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law. See People v. Chicago, M. & St. P. Ry. Co., 306 III. 486, 138 N. E. 155, 28 A. L. R. 610.

"It seems to me that this question here boils itself down to this proposition, can the legislature, without violating the provisions of the Constitution, compel an employer to pay wages to his or its employee for four hours, or any other amount of time, that he absents himself on election day and for which he gives his employer no service!" (R. 55-60.)

It will be noted that this court refused certiorari when petitioned by the State of Kentucky in the Kentucky case.

Judge Vandeventer then turns his attention to the two California and two New York cases. Again his analysis is flawless.

"There are also cases which seem to hold that such statutes are justified as a valid exercise of police power. . . The cases to the contrary in my opinion are not as well reasoned and logical as the ones above referred to.

"In People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2) 697, the company was convicted and fined \$100.00 on each of three counts for subjecting employees to a reduction of wages because of absence from work, while exercising the privilege of attending an election.

"The majority opinion did not discuss the constitutionality of the statutes. It was discussed, however, in a lengthy and well reasoned dissenting opinion by Lawrence, J., and at the close of that opinion he said:

"'So far as any case has been brought to my attention and so far as I have been able to discover, no court has decided that it is the right of any voter, under all circumstances, to be paid for

the privilege of voting. The statute here requires employers to pay their employees for two hours of time while exercising the right to vote, whether that is necessary or not, and thus deprives them of their property without due process and denies aftern the equal protection of the law, in violation of both the federal and state constitutions.

"In Kouff v. Bette hem-Alameda Shipyard, Inc. (Cal. App.), 202 Pac. (2) 1059, the question before the court was the legality of the discharge of an employee because to had taken off time to serve as an officer of election on election day. It was held that the statutory requirement was not unconstitutional. The court cited and discussed People v. Chicago, M. & St. Paul R. Co., supra, and Illinois Central R. v. Commonwealth, supra, and said:

It is interesting to note that both cases concede that that part of the statute requiring employers to allow time out tovote-2 hours in Illi- o hois and 4 in Kentucky is a proper exercise of power. It was for a violation of the part requiring full pay that both railroads were prosecuted. Although those cases deal with time out for voting, while this deals with time out for electionbeard service, there is no essential difference between the statutory language in those cases and that of section 696, viz., "nor shall any deduction be made from his usual salery or wages." However, it is not necessary for us to express any opinion as to the constitutionality of the part of section 695 just quoted. It suffices to say that it is olearly separable from the dismissal provision. See 12 Ca. Jur., pp. 643, 644. If the state can prevent employers from discharging employees because they serve on election boards, it follows that

the complaint states a cause of action for unlawful discharge.

"In the case of Lee et al. v. Ideal Roller & Mfg. Co., 92 N. Y. S. (2) 276, the cause was tried in the municipal court, Scileppi, Justice, presiding. The facts in that case were dissimilar to the one here. In that case an employee had worked 38 hours in a week and had been paid for 40 hours because of two hours off on election day. He was then called upon to work 4 more hours on Saturday after he had only-worked 38 hours but had been paid for 40. Under a union contract for overtime above a 40-hour week, he was to receive time. and one-half. He contended that the two hours for which he was paid and did not work should be counted in the 40-hour week so he could get time and one half for the full four hours worked on Saturday. His employer contended otherwise but Scileppi, Justice, held for the employee and rendered judgment against the defendant for the 4 hours worked on Saturday at overtime wages. No case is cited in the opinion as authority, no constitutional question was discussed and the only issue was whether to count the two hours that were paid for that were not worked in the 40-hour week so the full four hours on Saturday would be paid at the overtime rate. In its opinion, Scileppi, Justice, said:

"It is conceded by the defendant that it they plaintiffs had actually worked eight hours on Election Day, with two additional hours off to vote, the plaintiffs would be entitled to two hours pay at overtime rate for that day."

<sup>&</sup>quot;This case is therefore not in point here.

<sup>&#</sup>x27;In Ballarina v. Schlage Lock Co., 226 Pac. (2) 771, the Appellate Department, Superior Court, City and County of San Francisco, California, was considering

a statute in all essentials the same as ours. This statute had been enacted in 1881 and until November, 1950; had never been before the courts. It permitted every voter at every general, direct primary or presidential primary election to be absent from his employment for two consecutive hours between the time of opening and the time of closing the polls. It provided that he should not be liable to any penalty, 'nor shall any deduction be made on account of any such absence from his usual salary or wages.' This case never pretended to separate the two elements of the statute, that is, the right to be absent and the right to be paid. It merely stated that when persons enter into a contract, all material statutes affecting it are read into the contract by law. That, in the abstract, is a true statement but it has this exception, that it does not apply to an unconstitutional statute or part of one. The court then held that this statute taken as a whole was a valid exercise of police power and became a part of every contract entered into between employer and employee after its enactment" (R. 62-64).

The Ballarina case was a civil action to recover the wages allegedly due, not a criminal prosecution. Aside from that one clarifying statement it would be presumption on Appellant's part to attempt to modify, amend or expand Judge Vandeventer's analysis.

#### VII.

#### CONCLUSION.

For more than five decades the statute here before this Court lay dormant in the statute books of Missouri. Its sleep was undisturbed through five revisions of Missouri's code. It was fondly regarded as a shield and a buckler hanging, burnished and ready, on the bulwarks of democ-

racy to be donned if ever a citizen's right to vote should be refused. The warders of the tower never reckoned that a time would arise when the right to vote would be advocated synonymous with the right to be absent on election day with pay.

But out of the fetid sewers a feckless few, self-seeking and short-sighted, have raised an immoral demand. Nay, more than a demand—a threat. If hourly paid workers are not compensated by other private citizens for exercising the heritage of Yorktown and 150 years of liberty, they will not vote, and democracy will falter.

The shield has now become a lance levelled by this immoral suggestion at the bulwarks it was once designed to defend. For, if any group of citizens have to be paid for balloting, that which was before us lies behind us and no tree stands where it stood before.

Repulsive is the thought that a qualified free American could be denied his franchise. Equally loathsome is the alien idea that one segment of the electorate needs pay to encourage its participation.

The serpentine statute here invoked goes beyond the \$2.40 not earned by Grotemeyer, it transcends the denial of due process, equal protection of the laws and obligation of contracts—sturdy fundamental constitutional guarantees all.

American citizenship is the proudest legacy one can claim, be he tenant farmer or industrialist or skilled artisan. No law should prostitute the ballot of any citizen or group of citizens by patronizingly bestowing upon them a few paltry pennies for exercising a proud prerogative. A ballot should not be bartered—it should not be subsidized. "Take heed what thou dost. This man is a Roman."

The statute before this court, viciously undermining the roof tree of our freedom, must perforce be unconstitutional.

Respectfully submitted,

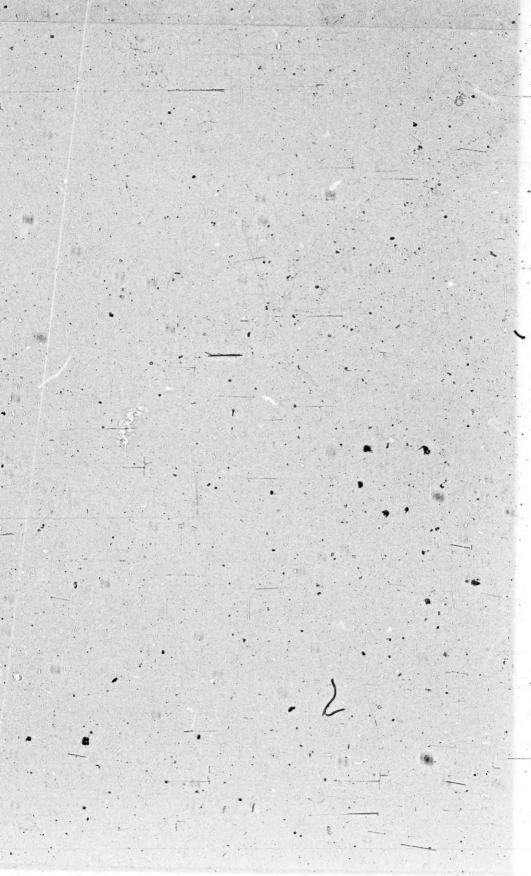
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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No.-317.

THE DAY-BRITE LIGHTING, INC.,
Appellant,

VS.

STATE OF MISSOURI.

Appeal from the Supreme Court of the State of Missouri.

# APPELLANT'S REPLY.

WILLIAM H. ARMSTRONG and HENRY C. M. LAMKIN, Counsel for Appellant.

LOUIS J. PORTNER, COBBS, BLAKE, ARMSTRONG, TEASDALE & ROOS, Of Counsel.

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## THE APPELLEE'S BRIEF.

The State of Missouri has filed its Statement, Brief and Argument in reply to Appellant's Statement, Brief and Argument. The issues should now be joined, and the points in controversy clearly delineated. A careful analysis of

the Appellee's brief shows unfortunately that such is act the case. A careful examination of its brief shows it has failed to answer appellant's arguments in three respects. These three ways are, according to the logicians, (a) the fallacy of petitio principii, or begging the question; (b) the fallacy of ignoratio elenchi (sophistry, sophism, fallacia consequentia, etc.), or disregarding the question; and (c) the fallacy of non-contradiction, or failing to answer the question.

The first two of these fallacies occur in appellee's attempt to answer some of appellant's contentions. The third is occasioned by its total failure to answer other of appellant's contentions. Perhaps the best way to analyze what appellee has replied is to place the two briefs side by side and go through them point by point, pro and con.

### A. AN ANALYSIS OF THE TWO ARGUMENTS

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- 1. Appellant's Brief (p. 13).
- B. The statute violates "The Due Process Clause."
- 1. Appellant is deprived of tangible property by this statute.

Appellant argued it was deprived of a substantial amount of money forced to be paid to employees for work not performed. This is true on every election day.

Appellee's Brief (p. 15).

Part H, Appellee's Brief, baldly states the questioned statute is not deprivation of property without due process of law. Nowhere in the brief does appellee deny appellant's contention in B-1 above. The majority opinion of the Missouri Supreme Court admitted it (R. 40).

2 Appellant's Brief (p. 15).

B-2. Appellant is deprived of its property right to contract.

Appellant is deprived of property right to make a reasonable contract without due process.

Appellee's Brief (p. 45).

Appellee argues that freedom of (to) contract is a qualified right. It cites West Hotel Company case in part as follows: "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulation ..." (p. 17). (Emphasis supplied.)

Here we have a splendid example of begging the question. Appellant raised again and again the remonstrance that it was deprived of the right to make a reasonable contract—that the statute imposed "arbitrary restraint" on its property right to contract reasonably. The appellee argues legislatures have the right to restrict freedom of contract under certain circumstance, e. g., "injurious practices in their internal commercial and business affairs"; "to suppress business and influstrial conditions they regard as offensive to the public welfare" (p. 16), as well as various types of contracts involving labor legislation.

By no single syllable does appellee argue that the restraint imposed by this law is reasonable, nor does appellee argue that the contract as entered into between appellant and Grotemeyer was unreasonable. Its argument simply states that under certain circumstances the State has the right to impair the obligation of contracts as long as such impairment is to the promotion of "the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity" (p. 21). Therefore, concludes appellee, the section in question represents a legitimate exercise of the police power

of the State of Missouri. Sophistry of this type can prove nothing.

- 3. Appellant's Brief (p. 15).
- B-3. Appellant is deprived of the fruits of its contract.

Appellant here argued that the employer had as its property a right, secured by contract, to an hour's work for each hour it paid its employees and called attention to the Union contract between Grotemeyer's Union and appellant. The decision of the Missouri court deprives this appellant of that property right without due process.

Appellee's brief contains no contradiction of this argument.

- 4. Appellant's Brief (p. 16).
- . B-4. Private property is confiscated to another's enrichment.

Here appellant argues that the statute takes private property from one citizen and gives it to another citizen without due process. In effect, the law demands the private maintenance of a public enterprise. No reason can exist for forcing one portion of the electorate to pay another portion of the electorate for exercising a right equally vital to both. It is particularly bad when, as here, the employer has no means of ascertaining whether the employee is entitled to vote or whether he in fact does vote.

Appellee's Brief (p. 19).

Appellee argues that the legislature has the power to levy taxes to spend the money for a public purpose and that the tax burden is not equally distributed upon all, persons. Appellee evidently does not recall that an amendment to the Constitution of the United States had to be passed before an income tax could be held constitutional.

It further argues that the furnishing of free textbooks to school children has been upheld. Would appellee contend that employer's could be constitutionally forced to buy free textbooks for the school children of employees or that all farmers could be forced to pay for free school lunches for the children of all cab drivers? Further, the argument of the appellee concerns those cases in which the state has collected the money and made the disbursements, not when it has forced one group of the electorate to pay directly to another portion of the electorate.

The appellee does then proceed to cite two cases (pp. 20-1) involving labor legislation. It is interesting to note that the citation from Carmichael v. Southern Coke & Coal Co., 301 U. S. 495, starts out: "The end being legitimate ... "and the Mountain Timber Co. v. State of Washington, 243 U.S. 219, contains in the state's quotation the following language: "... such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people ...," as well as the quotation concerning the promotion of health, peace, etc., previously set out above.

The courts have felt and properly felt that the economic welfare of the country demanded certain safeguards be erected for the promotion of health, safety, peace, education, morals, and good order in the industrial field, but as pointed out by the appellant in its brief, the legislation here is not and cannot be labor legislation. It was passed to prevent corrupt practices at elections (Appellant's Brief, 36).

Appellee recognizes this on page 18 of its brief when it states that the section is "designed to provide for free and open elections." Appellee in a purported answer to appellant's argument under this point cites Santiago v. People of Puerto Rico, 154 Fed. (2d) 811; illustrating the right of a free people to participate in political affairs. Of course, none of the argument advanced has anything to do

with the taking of private property to another's enrichment.

The laws involving labor legislation and the other arguments advanced clearly show appellee has fallen into the fallacy of believing the point can be proved by an argument which proves something not at issue. We are not here debating the wisdom of labor legislation nor the right of a free people to participate in political affairs. We are solely concerned on this point with the constitutionality of taking property by state statute from one group of voters without due process and giving it to another group of voters.

# 5. Appellant's Brief (p. 19)

B-5. The State usurps power in derogation of appellant's vested rights.

Under the Constitution of the United States the Federal Government has delegated to the states the authority determine the time, place and manner of holding national elections. Forcing an employer to pay an employee for services not rendered (and in contravention of his union contract) for time said employee absents himself from his work on election day (whether he votes or not, or whether he is entitled to vote or not) has no relation to the time place or manner of holding elections. When the state usurps the power to inflict upon appellant a fine in the criminal prosecution for violating the provisions of a statute embodying such unauthorized encroachment in a national election, the appellant is being deprived of property without due process in contravention of the Fourteenth Amendment.

Appellee's Brief (p. 7).

· Appellee's only answer to the above contention is that appellant's argument "seems to imply" that this statute

is violative of Article One, Sections 2 and 4 of the United States. Constitution, which is raising a Federal question for the first time on appeal and hence the Federal question is raised too late. That argument would be sound if that were appellant's argument. Appellant's argument, however, is to the effect that the state's violation of those sections results in depriving appellant of property without due process; that the state's usurpation of power is the cause and not the effect. The effect is the deprivation of property which has certainly been raised throughout appellant's brief. So appellant's argument on this point is entirely unanswered by the appellee.

# 6. Appellant's Brief (p. 22).

D-6. Police Power sicklied o'er with the pale cast of thought.

The Missouri court admitted the statute was a denial of due process, but justified it by an unprecedented extension of the police power. Nowhere did the Missouri court distinguish between a guarantee of the right to vote and a guarantee of the right to be paid for absence from work on election day. (It may be noted here that this question has not been answered by appellee in its brief and its existence has been entirely ignored. Appellant submits that distinction must be made to adjudicate this matter properly. Otherwise there is an irreconcilable conflict.)

Appellant continues with its argument that the statute is not a reasonable exercise of the police power for several reasons. It is an extension of the police power into a field in which police power has never before been considered. It creates an immoral and an unprecedented classification of voters. Hourly paid workers are not more derelict in their duty of voting than other segments of the electorate. Everyone should have the right to vote, but no segment of the voters should receive pay for absenting themselves.

from work on election day. An unreasonable burden is cast upon the employer. The appellant did not even violate the law in question when the plain and usual meaning of the words contained therein are construed in their plain, everyday meaning. Hence the appellant was deprived of property without due process when it was convicted and had committed no crime. The statute is unreasonable because the time fixed thereby was not a reasonable or necessary time according to the prosecuting witness' own testimony.

This Court, in passing on the question, should follow its reasoning in West Coast Hotel Co. v. Parrish, 300 U. S. 379, Len it examined legislation, previously held unconstitutional in Adkins v. Children's Hospital, 26BU. S. 525, in the light of the "economic conditions which have supervened (since this statute was passed in 1897 when the working day was 14 to 16 hours) and in the light of which the reasonableness of the exercise of the protective power of the State must be considered." Employer dominance no longer exists in the light of present economic conditions. There is no reasonable basis for the exercise of police power to justify appellant's deprivation of property without due process of law. Labor legislation has always been classified as such in the bill creating the legislation. This is not labor legislation.

Appellee's Bruf (p. 10).

E. The enactment of Section 129,060, R. S. Mo. 1949, is a constitutional exercise of the police power of the State.

Appellee argues that the statute was passed by the State legislature to provide a means of insuring the largest possible vote. The exercise of the voting privilege is clothed with a public purpose. Other states have adopted similar legislation because they recognized the existence of the evil of the employer domination. In any consideration of the principle of the legitimate exercise of the police power,

the Legislature is free to do anything not forbidden by the State or Federal Constitutions. Except for these limitations, the power of the State Legislature is unlimited.

The Coastitution of the State of Missouri provides elections shall be free and open and no power, civil or military, shall interfere with the free exercise of the right to vote. In keeping with this spirit the legislation in question was passed. This was a valid exercise of the police power. Nowhere throughout its amazing feat of begging the question does the appellee touch on the reasonableness of the legislation, the justification for the legislation, any precedent for such an extension of the police power which the appellee states is "the power inherent in every sovereignty to protet not only its very existence, but also the security of the social order, the life and health of the citizens, the enjoyment of private and social life and the beneficial use of property" (p. 11). (Emphasis supplied.)

The appellee, it is to be feared, has fallen into the fallacy wherein that which is to be proved is implicitly taken for granted. Appellant has attacked the exercise of the police power under the circumstances here present for a great/many reasons. Appellee has answered none of them. It says the police power can be exercised under certain conditions. Therefore, it was properly exercised here. It again goes from major premise to conclusion without troubling itself over the all important minor premise as to whether those certain conditions are here present.

Appellant's Brief (p. 36).

C. The Statute Denies Equal Protection of the Laws.

The statute deals with corrupt practices in elections. All voters are in an equal position or "similarly situated." This statute forces one group of voters to subsidize another group of voters and does not even insure

that the group being subsidized actually vote or actually are voters. It merely subsidizes then for absence from their employment on any election day. This classification made by the statute is arbitrary, unreasonable and denies appellant equal protection of the laws.

Appellee's Brief (p. 13).

G. The section is not a denial of the equal protection of the law.

Employers as distinguished from employees do not constitute a class as within the constitutional prohibitions against class legislation. The statute applies to every employer and every employee in the State of Missouri. (This is not true. It applies only to employees who are voters.) The statute was enacted as a legislative answer to a serious evil-the domination of political life by employers. (Nowhere does appellee discuss, concede or deny the vastly different position of employees now and in 1897. It will be borne in mind that this case, under the doctrine. in the West Coast Hotel Co. case, is to be examined in the light of present-day conditions and the economic conditions which have supervened since the passing of the legislation.) A law to escape the criticism made by appellant here must affect alike all persons in the same class and under similar conditions. (When it comes to voting, there is no class distinction as pointed out by appellant in the authorities cited on pages 38 and 39 of its brief.)

In support of its contention, appellee again cites cases concerned with labor legislation, not legislation to prevent corrupt practices in election. Appellee throughout speaks of economic classifications, which have no application here, and not a political classification. As far as this legislation is concerned, all voters are similarly situated. Appellee's argument is again a classic example of begging the question.

Appellant's Brief (p. 42).

D. The Statute Impairs the Obligation of Contracts.

There was a Union contract creating duties and obligations both on the part of the employer and the employee. Among other things, the employer was entitled to receive one hour's work for each hour's pay; no employee could hold the employer to the exact terms of the contract and refuse to comply with those terms himself. If the employee cannot do so, the State cannot pass a law effecting the same result.

The authorities hold the Government can regulate contracts reasonably calculated "to injuriously affect the public interest." No possible construction of the Union contract in question can show that it is "reasonably calculated" to injuriously affect the public interest. The employee's interest in government is as great as the employer's. It is not reasonable to say that an employee in the exercise of a moral civic duty and while exercising a legal right must do it at his employer's expense and to the impairment of his working agreement.

The purpose behind the prosecution here is to secure pay for Union employees for work not performed and services not rendered. A contract contains the provisions of all valid material statutes. This applies equally to both contracting parties. The provisions of this statute could be waived by the employee. When the contract was silent on the question, any right to receive pay for work not done was thereby waived. No statutory provision in Missouri makes the contract entered into by the parties invalid. The decision of the court below by invalidating part of the contract abrogates the obligation of contracts.

Appellee's Brief (p. 12).

F. The statute is not unconstitutional as an impairment of the obligation of contract.

Appellee argues that the constitutional protection of the obligation of contracts is necessarily subject to the police power, and therefore a statute passed in the legitimate exercise of the police power will be upheld although it may destroy existing contract rights. (Again appellee begs the question by assuming that which is to be proved, namely, that the exercise of the police power is legitimate, has been proved.) It goes further to state that the law was in effect at the time the contract was entered into and hence necessarily was included in the contract. This would be true only if it were a valid law and only if the provisions of it were equally binding on both parties. Under the Fair Labor Standards Act or other types of labor legislation, an employee could not contractually agree to work for less than the minimum 75¢ per hour and thereby relieve the employer from criminal or civil liability. In this case the employee could contractually agree to not take the allotted time off to vote and receive double time therefor, or he could simply refuse to avail himself of the opportunity, and the employer would not be guilty of a violation of the statute. There is a vast distinction between the sanctions imposed in labor legislation and in the statute here in question, which of course is not labor legislation at all. Appellee fails to meet appellant's contention on this point in any respect.

Appellant's Brief (p. 48).

E. Decisions in other states.

This is dealt with to a limited extent by appellee in its brief on page 24. It is interesting to note that prior to the Misson's decision this question had been passed on by courts States of Kentucky and Illinois have held similar statutes unconstitutional. The appellee contends somewhat vapidly that the State of Illinois would not reach the same conclusion today. It bases this contention on the fact that the statute has been re-enacted by the legislature from time to time. As pointed out by Judge Vandeventer in his dissent in the Missouri case (R. 59), the fact that the statute has been re-enacted and maintained on the statute books does not make it constitutional, nor does the fact that it was passed over 50 years ago and there are no decisions on it attempting to prove its constitutionality. "More likely it proves that there has never been any attempt to enforce it."

Zelney v. Murphy, 56 N. E. (2d) 754, 387 Ill. 492, relied on by the appellee to show the changed attitude of the Illinois Court, does no such thing. The Illinois Court simply refuses to confuse the Illinois Corrupt Practices in Election Act with labor legislation. It is unfortunate that appellee has not avoided the same confusion.

Then the editor of C. C. H. Labor Law Journal and an unsigned article in the Columbia Law Review are taken by appellee as authority that the Supreme Court of Illinois would now change its holding. Of course, the Columbia Law Review article indulges in the same fallacy as does appellee. It is noted that the Columbia Law Review article (Appellee's Brief 35) starts off: "The problem of pay while voting should be considered against its proper background of constitutional decisions in the field of labor legislation." (Emphasis supplied.)

The Missouri Supreme Court upheld the present statute when it was attacked under the provisions of Section 23, Article 2, Missouri Constitution for 1945, providing that no bill shall contain more than one subject which shall be clearly expressed in its title, as a law passed to prevent corrupt practices in elections.

The Columbia Law Review article makes interesting reading. It cites the West Coast Hotel Co. case, but fails to recognize the court's reasoning in that case wherein it overruled the Adkins case because of changed economic conditions. The article does not point up the difference in the economic condition of the employee now and fifty years ago, which this Court under the West Coast Hotel Co. doctrine must do. It finds a marked similarity between this type of legislation and minimum wage legislation. It does concede, "The chief differences are in the purposes of the legislation, and the requirement of payment for a period in which the employee performs no services," but the anonymous law school student from Columbia University thereafter forgets all about the difference in the purpose of the legislation. It states further in the article, "Some democratic countries have even gone so far as to make the casting of a ballot a legal duty." (See appellant's brief. page 18.) This statute seeks no such purpose. It seeks pay for one segment of the voters for being absent from work.

The article continues, "An extremely strong presumption operates in favor of the constitutionality of statutes regulating economic matters." The statute here scrutinized is to prevent corrupt practices in election, not to regulate economic matters. It even ends on that same note, "The present reluctance of the courts to substitute their judgment in the economic realm points the way to the constitutionality of pay while voting statutes." (Emphasis supplied.)

The decision of the Court of Appeals of Kentucky, which is Kentucky's court of last resort, is brushed aside by the appellee stating that the Kentucky court based its decision on the Illinois case which has since been repudiated by the Illinois Supreme Court.

There are decisions of courts in California and New York which appellee strongly contends are controlling. It is

interesting to note that the New York cases are by the Appellate Division of the Supreme Court of New York and not by the Court of Appeals of New York, which is New York's court of lest resort, and that the Appellate Division of the Supreme Court does not have the jurisdictional authority granted by the New York Constitution to determine constitutional matters.

In Lee v. Ideal Roller & Manufacturing Co., 92 N. Y. S. (2d) .26 (admitted by the appellee as not considering the constitutionality of the New York statute), the New York court fell in the time-worn pitfall, "Section 226 of the Election Law was enacted to protect the earning capacity of employees..." (Appellee's Brief 29), but the Missouri Court has said the statute here questioned was enacted to prevent corrupt practices in election. Appellee quite disregards Judge Vandeventer's analysis of the two California cases which, incidentally, were not only not in point, but which were decisions by the Appellate Deportment of the Superior Court of the City of San Francisco. These decisions can be no final authority on the constitutionality of any California statute.

Appelled also chooses to leave unanswered Judge Vandeventer's analysis of the two New York cases where he states concerning The People v. Ford Motor Company, supra, "The majority opinion did not discuss the constitutionality of the statutes" Ar. 62). Judge Vandeventer clearly distinguishes the California and New York cases from the case at bar. It might be noted in passing that the New York law and the California law both provide for a period of only two hours, provide that the employee must actually vote (New York directly, California impliedly), and apply only to general elections in New York (there is a special rule for primary elections) and for general elections, direct primary elections and presidential primary elections only in California. The Missouri statute provides for four hours, the employee does not have to vote, or even

be entitled to, and it applies to every election from road overseer to the President.

The New York and California statutes would appear to attempt a much more reasonable exercise of police power. Appellant does not concede that the New York or California statutes are constitutional, but calls the Court's attention to the distinction between the California-New York statutes and the Missouri statute. Even appellee admits its newly invented exercise of police power must be reasonable under the circumstances.

At the end of its Brief, appellee (p. 37) included exwents from the Findings of Fact and Conclusions of Law of a district judge's holding in a Minnesota county. statute is not set out; the facts are not set out; so it is impossible to apply those facts to the instant case. Minnesota statute obviously differs widely from the Missouri statute in that the Minnesota statute sets no definite length of time and provides the hours shall be "during the forenoon." Even the District Court in Minnesota, which, of course, is not a final authority on the constitutionality of any statute, in an ambiguous manner determined that the employee was entitled to pay only for "such period of time during the said forenoon that they reasonably and necessarily heeded for said purpose" (Appellee's Brief 38). It required that such absence from work be "for the purs pose of voting," and there is no showing as to whether the employees in question were paid by the hour, the day, the week or the month. The Minnesota case represents a frantic grasping at straws.

#### B. FURTHER OMISSIONS OF APPELLEE.

In addition to the arguments of appellant that appelled has sidestepped, misconstrued or failed to answer, as previously pointed out, there are a number of other arguments advanced in appellant's brief concerning which appellee is

strangely and significantly silent. Appellant throughout has requested that appellee explain how the right to vote is synonymous with the right to be absent on election day with pay. Appellant has sought in vain an answer to its query as to why a burden should be placed on one segment of the electorate to the benefit of another segment of the electorate. Appellant has queried as to whether hourly paid employees did not have an equal obligation and duty to vote on their own time, or without compensation, the same as other voters. Appellant has exposed the immorality of the deman's made by the Usion and sustained by the Missouri court. Appellant has shown there no longer exists an employer domination; that unions of hourly paid workers stand peerlessly in the economic and industrial field. Appellant has deplored their attempt to secure an economic advantage in a political field where their voice is already strident and clear. Appellant has decried this attentated departure from the accepted American tradition.

To none of these has appellee returned an answer. It has shown at no time why the right to vote means the right to be paid for being absent, why hourly paid employees have the right to demand and receive pay in violation of the Union contract for being absent on election day, whether the employee is entitled to vote or does vote. It is not asserted that in the light of present-day conditions the evil employer can brow-beat his sweaty employee. It has not denied the immorality of the concept inherent in this legislation. It has wilfully disregarded the effect of the moral disintegration that will be occasioned if this statute is upheld. It has not rejected the charge that the hourly paid employees, or at least a militant minority thereof, are attempting unconstitutionally, and in violation of all ethical standards to obtain something for nothing.

#### II.

# OF LABOR, AMICUS CURIAE.

On proper request to the parties in this matter, consent was willingly given to the American Federation of Labor to file a brief as Amicus Curiae in this cause.

As this great Labor Union has stated on page 1 of its brief: "Its interest lies in the fact that it represents hundreds of thousands of employees who are the beneficiaries of laws in the State of Missouri. . . . (Emphasis supplied.) This opening statement unwittingly admits more than any argument appellant could make the inherent unconstitutionality of the statute here in question. The A. F. of L. represents "the beneficiaries" of the laws in the State of Missouri. This is the underlying objection of appellant in this matter. The hundreds of thousands of employees represented by the A. F. of L. have as vital an investment in their country's institutions as any other group of the electorate. It is immeral for them to seek to be the beneficiaries of a law that would pay them for absenting themselves from work on election day. It is this frank subsidization that appears such a far cay from our o concept of free and open elections.

Apparently the A. F. of L. does not understand the feeling of the Kentucky judge when it says (page 9):

"From a careful reading of the opinion (i. a., the Illinois Central Railroad v. Kentucky) the decision appears to rest on the court's personal distaste for the law. It was condemned thusly: 'It does not seem to be in keeping with the American tradition.' The court treated the penalties for pay deduction as a provision for pay for voting and found this highly offensive.'

The brief of the A. F. of L. does not show how the penalties for pay deduction are not provision for pay for voting nor does it seem to think that such a provision would be highly offensive. The Court will remember that under the Missouri statute the employee not only may not vote but may not be entitled to vote. The A. F. of L. does not deny that such a statute is not in keeping with the American tradition.

o On page 2 of its brief, the A. F. of L. mistakenly states that the validity of the statute gunder, the Fourteenth Amendment is concerned with only two questions: (A) Is the promotion of a full exercise of the right of seffrage a proper concern of the legislature in that the interest of the public requires such promotion, and (B) Were the means adopted by the legislature reasonably necessary for the accomplishment of that purpose? In answer to the first question it states that it is desirable for as large a percentage of the electorate as possible to vote. There can be no question about this, but it is submitted that the means chosen by the legislature to carry out the plan does not promote the end sought. It overlooks the hourly paid working man's interest in good government and every other argument advanced by the appellant. It then decides that the means adopted were reasonably necessary. It continues that to determine the reasonableness it is necessary to view the circumstances existing at the time of the passage of the statute (page 3) and says: "Any other rule than this, such as determining the reasonableness of the statute by presently existing conditions, would require the court to sit as an arbiter on changing social trends."

The A. F. of L. then finds that what it calls the Lockner Adair-Adkins cases to be no longer the ruling law, but it this Court were to apply solely the circumstances existing at the time of the passage of the statute it would have to also apply the state of the law as enunciated by this court sitting at the time of the passage of the statute, which both appellee and the A. F. of L. concede would

have found this statute unconstitutional without any more ado.

The A. F. of L. contends that the West Coast Hotel Co. case to being controlling and quite forgets that case in overruling the Adkins case considered the legislation in light of "the economic conditions that had supervened" since its ruling in the Adkins case. Maybe the court was not sitting there as an arbiter on changing social trends, but such a conclusion is hard to escape.

Particularly interesting is the A. F. of L.'s argument found on pages 8 and 9 of its brief when it applauds the Illinois Supreme Court's being "properly responsive to the Constitutional tunes" and offes with approval from Zelney y. Murphy, where apparently the Supreme Court of Illinois is sitting as an arbiter on changing social trends:

"These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The growing complexity of our economic interests this inevitably led to an increased use of regulatory findicures in order to protect the individual so that the public good is reassured by safeguarding the economic structure upon which the good of all depends.

As pointed out before, the Murphy case was labor legislation, and the Illinois court properly recognized the rule would be and should be different from the voting statute. It concluded that the cases involving pay while voting could not be controlling in the consideration of a statute involving workmen's compensation. But the A. F. of L. highly approves its taking cognizance of the "growing complexity of our economic interests." Under either situation the statute cannot be constitutional. If it had been tested at the time it was passed in the light of economic conditions existing then and of the trend of the courts then, it would be held unconstitutional. If it be considered in the light of present conditions, which the West Coast Hotel Co. case indicates is the proper rule, no necessity and no reasonableness has been shown for its being upheld. Hourly paid employees or any other employees are no longer subservient to the whims or oppressions of their employers. Neither appellee or the A. F. of L. has proclaimed any economic necessity existing at the present time.

The brief then continues on page 4 with statistics about the number of hours per week worked by employees throughout the United States, in Missouri and in Kansas. It does not show how many of these were hourly paid workers or hew many were paid by the day, week or month who would suffer a deduction of wages if they were docked for the time taken to vote. The figures are meaningless without such a distinction. Appellant has nevel contended that an employee paid by the month could be or should be docked for the time necessary taken to vote. It has violently contended that a man who has entered into a contract to work an hour for each hour he is paid cannot constitutionally receive payment for whimsical absence from work on election day. The A. F. of L. sees fit to indulge in the wildest speculation: ". . . was perhaps not unheard of for an employer to r quire its employees to work extra hours for the very purpose of defeating that right." An employer today would have no such power and the A. F. of L. does not even contend that the employer would or could, under present-day existing circumstances, do such a funciful thing.

The brief next turns its attention to the economic burden. The reasoning is a little hard to follow. Pages 4 and 5 of the A. F. of L.'s brief reads as follows: "Even where the length of his working day was not such as to physically interfere with the right to vote, a working man heavily dependent upon his earnings to support his family could ill afford a deduction in pay for any reason. Confronted with a choice of refraining from voting or bringing home a smaller paycheck, many workingmen would stay at their jobs."

The A. F. of L. first assumes that the length of his working day would not physically interfere with the right to vote and then says that because he couldn't afford the loss of pay he would not vote. It is hard to see how, if he has time to vote aside from his working day, he can justify not voting because he doesn't want to take the time of from his job to vote and thereby lose the pay. The A. F. of L. quite overlooks the fact that the choice is not simply a choice between refraining from voting or bringing home a smaller pay check, but there is a third alternative that the working man can vote on his own time. Grotemeyer not only could have, but did vote on his own time. Still he wanted pay to campaign and to get out the vote.

The brief has pointed out very clearly on page 6 that an employee who absented himself twice for a four hour period (four hours absence from work would not conceivably be necessary) would still be gone no more than twenty-five hundredths of one per cent of his annual working time. This, of course, would mean that his annual pay check would be diminished no more than twenty-five hundreths of one per cent, but appellee and the A. F. of L. would insist that the employer should reimburse the employee for this twenty-five hundredths of one per cent. Does the A. F. of L. mean to imply that the working man's stake in his government is not worth twenty-five hundredths of one per cent of his income; that the working man will not vote unless the employer reimburses him

for this "infinitesimal amount," whether he needs the time or not? We cannot believe that the A. F. of L. believes this.

Continuing on page 7, the brief reads: "When a small pecuniary deprivation of the employer is placed alongside the public interest to be served by a full and complete electoral process, it becomes even clearer that the legislative action was reasonable in every respect." Appellee and the A. F. of L. carefully refrain from admitting any duty rests upon the hourly paid employee to vote. Neither has once shown why this burden of good citizenship should be borne entirely by the employer and none by his employee. They speak of "public interest" and "public welfare." Are these not vital to Frederick C. Grotemeyer or any of the hundreds of thousand of employees represented by the A. F. of L.!

Under any circumstances the employer suffers a financial loss when employees are not at work, namely, a heavy production loss. This was shown to be \$7,138.00 as far as appellant was concerned (R. 11). This \$7,138.00 production loss did not include the additional loss to the company of \$951.42 demanded to be paid as wages for work not done. This production loss cannot be avoided. The anrighteous compensation to employees in violation of a contract usually regarded by a Labor Union as sacred can be avoided. Payment for time not needed or not utilized should not be pressed down upon the brow of the employer. The dignity of the working man should not be crucified upon the cross of this legislation.

III.

#### CONCLUSION.

Appellant mayhap has wearied the court with a seeming endless repetition of two or three points that it feels vital this Court should consider and discuss. Appellant desires

to be sure that these points are not disregarded as appellee and the Missouri Court have disregarded them. A pellant would be remorseful if, through a faulty presentation, the Court did not have an opportunity to consider fully these matters which appellant feels so strongly are determinative in this cause. The question of the morality of the statute, the question of why the right to vote is synonymous with the right to be paid for being absent from work on election day, the question of why one segment of the electorate should subsidize another segment of the electorate when all voters are similarly situated, and the question of whether an hourly paid employee does not have an equal interest in his country's welfare, have all been unanswered by the State. Half answers and evasive answers have been presented to a great many other questions.

Appellant feels that when this Honorable Court has fully considered the questions herein presented it will declare that appellant is entitled to the relief in this cause prayed for in its petition for appeal, namely, a reversal of the decision of the Supreme Court of Missouri.

Respectfully submitted,

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Office Supreme Court, U. S. F. 1 L. 10 10

SEP 12 1951

SUPREME COURT OF THE UNITED STATES CLERK

OCTOBER TERM, 1951

No. 317

THE DAY-BRITE LIGHTING, INC.,

Appellant.

vs.

STATE OF MISSOURI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

## STATEMENT OPPOSING JURISDICTION

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## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

### No. 317

STATE OF MISSOURI

Appellee.

VS.

THE DAY BRITE LIGHTING, INC.,

Appellant

STATEMENT OF SUGGESTIONS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

(a)

Federal Questions Raised for the First Time on Appeal to the Supreme Court of the United States are Raised Too Late

The appellant, in paragraphs 4, 5, 6 and 7 of Paragraph V of its jurisdictional statement, raises for the first time certain federal constitutional objections. In Paragraph IX of the statement, appellant admits that these federal questions were raised "after the judgment of the Supreme Court of Missouri became final by its act of overraling appellant's motion for rehearing on the 11th day of July, 1951." It is well settled by this court that federal questions raised for

the first time in a petition for appeal are raised too late and that this court has no jurisdiction to determine the same. Missouri Pacific R. Co. v. Hanna, 266 U. S. 184; Rogers v. Clark Iron Co., 217 U. S. 589; Mallers v. Commercial Loan Investment Co., 216 U. S. 613.

There is further reason why paragraphs 4, 5, 6 and 7 of Paragraph V of the jurisdictional statement present nothing for review by this court and should not be considered. Paragraphs 4 and 5 allege that the judgment of the Supreme Court of Missouri in finding the appellant guilty of the violation of Section 129.060, RSMo 1949, deprived the appellant of its property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution of the United States. It is a fundamental principle of constitutional law that the first eight amendments to the Constitution of the United States apply only to acts of Congress and do not apply to acts of the states. Gaines v. Washington, 277 U.S. 81; Twining v. New Jersey, 211 U.S. 78; Hunter v. Pittsburg, 207 U.S. 161.

Therefore, the appellant cannot here claim that a state statute deprives it of any rights under the Fifth Amendment to the Constitution of the United States.

In paragraph 6 of Paragraph V the appellant states that it was denied equal protection of the laws contrary to the provisions of the Fourteenth Amendment because the information filed in the cause did not state facts sufficient to accuse and convict the appellant. The decisions of this court are uniform in holding that the question of the sufficiency of an indictment or information is not a Federal question. Barrington v. Missouri, 205 (U.S. 483; In Re Robertson, 156 U.S. 183; Leeper v. Texas, 139 U.S. 462.

Paragraph 7 of Paragraph V states that the judgment of the Supreme Court of Missouri denied appellant the

equal protection of the law contrary to the Fourteenth Amendment because the facts were insufficient to show that the appellant had violated the statute. This contention is answered by the statement in Whitney v. California, 274 U.S. 357, in which the court stated, l.c. 367:

"This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury—sustained by the Court of Appeal over the specific objection that it was not supported by the evidence—is one of fact merely which is not open to review in this Court; involving as it does no constitutional question whatever."

In view of the above it would seem that the Federal questions which the appellant has attempted to raise in paragraphs 4, 5, 6 and 7 of Paragraph V of appellant's jurisdictional statement are raised too late and are so devoid of merit that the court is justified in declining jurisdiction of the appeal.

(b)

#### Appeal Should Be Dismissed Because There Is No Substantial Federal Question

An appeal to this Court will be dismissed if no substantial Federal question is raised by the appeal. Manhattan Life Ins. Co. of New York v. Cohen, 234 U.S. 123, 136, 137; Campbell v. Olney, 262 U.S. 352, 354; Tidal Oil Co. v. Flanagan, 263 U.S. 444, 455, 456; Roe v. State of Kansar ex rel Smith, 278 U.S. 191, 193.

As was held by Mr. Chief Justice White in Equitable Life Insurance Society v. Brown, 187 U.S. 308, 311 r. The doctrine \* \* is that although \* \* it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy" the cause will be dismissed.

This case is an appeal from a conviction in which the appellant was adjudged to pay a fine of \$100 for violation of a state statute making it a misdemeanor for any elaployer to refuse to permit an employee to absent himself from his employment without suffering any penalty or deduction of wages.

The appellant has sought to assail this legislation on various constitutional grounds, and now seeks to have this misdemeanor conviction reviewed by the United States Supreme Court.

It is appellee's contention that jurisdiction of this review should be denied on the grounds that there is no substantial Federal question.

Appellant contends that it has been denied the equal protection of the laws by the legislative enactment in question. A reading of the statute clearly shows that it is singularly free from the criticism leveled against it by this assignment. The statute applies with complete uniformity of duty and privilege, respectively, to all employers and to all employees. The United States Supreme Court has frequently recognized the special classification of the relation of employees and employers as proper and necessary for the welfare of the community and requiring special treatment. (Truax v. Corrigan, 257 U.S. 312, 338.)

Appellant also seeks to find a basis for jurisdiction of

this appeal by the assertion that the statute impairs the obligation of contract. At this point it is well to remember that this statute had been in effect for almost fifty years at the time that the contract between the employer and the union representing the employees was executed.

It has been recognized that freedom of contract is a qualified and not an absolute right. This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day; in limiting hours of worksof employees in manufacturing establishments; and in main taining workmen's compensation laws. In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. (West Coast Hotel Co. v. Parrish, 300 U. S. 379, 392.)

The third main point relied on by appellant for jurisdictional purposes is that the statute is a denial of due process of law. This assertion is made in the face of repeated decisions of the United States Supreme Court holding, in effect, that state legislatures have not been placed in a legalistic strait jacket by the Fourteenth Amendment. Throughout this case there has been no question but that the statute was an enactment under the police power. In the case of Noble State Bank v. Haskell, 219 U.S. 104, this Court, speaking through Justice Holmes, said, l.c. 110:

"In answering that question, we must be cautious about pressing the broad words of the 14th Amend-

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ment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare

as against the fawmaking power.

"The substance of the plaintiff's argument is that, the assessment takes private property for private use without compensation. ? . In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. \* . And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U.S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 576. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

And, in the case of Mountain Timber Co. v. State of Washington, 243 U.S. 219, 238, the United States Supreme Court upheld the validity of the Workmen's Compensation Act of the State of Washington, stating as follows:

"As to the first point: The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state

regulation and administration. Lawton v: Steele, 152 U.S. 133, 136, 38 L. Ed. 285, 388, 14 Sup. Ct. Rep. 499. 'The police power of a state is as broad and plenary as its taxing power.' Kidd v. Pearson, 128 U.S. 1, 26, 32 L. Ed. 346, 352, 2 Interst Com. Rep. 232, 9 Sup. Ct. Rep. 6. In Barbier v. Connolly, 113 U.S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, the court, by Mr. Justice Field, said: Neither the 14th) Amendment—broad and comprehensive as it is—nor any other Amendment, was designed to interfere with the power of the state sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

This Court has upheld the validity of minimum wage regulation in West Coast Hotel Co. v. Parrish, supra.

The distribution of free textbooks to school children has been held not violative of constitutional provisions. Cochran v. Louisiana State Board of Education, 281 U.S. 370.

The applicable rule has been succinctly stated in Miller v. Schoene, 276 U.S. 272, 279:

or ferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

(Citing cases.)

We have many decisions of the United States Supreme Court clearly setting forth the extent of the police power residing in the states. Abstractly considered, perhaps every enactment of a state legislature may be said to infringe upon some right guaranteed by the Constitutions, both State and Federal. However, when questions similar to principle have been resolved so clearly against the person urging the unconstitutionality of legislation, it must be said that there is no substantial Federal question involved, and jurisdiction of this Court should be declined. (Zucht v. King, 260 U.S. 174, 176.)

(c)

The Appellant Has Not Sustained the Burden of Proof To Show Affirmatively That the Supreme Court Has Jurisdiction

It is well settled that, upon application to this Court for review of a judgment of a state court, the burden is upon the appellant to show affirmatively that the Supreme Court of the United States has jurisdiction to hear and decide the cause. Memphis Natural Gas Company v. Beeler, 315 U.S. 649; Gorman v. Washington University, 316 U.S. 98.

In support of this appeal, appellant has set forth in its jurisdictional statement the grounds upon which it contends that the questions involved are Federal questions and are properly for review by the Supreme Court of the United States. To sustain this position the appellant has cited the court to five cases. However, it is strongly contended that these cases are not sufficiently in point to permit the appellant to satisfactorily show affirmatively the court's jurisdiction of the appeal. These cases cited by appellant are not sufficient to show that there is a substantial Federal question involved in the instant case in a jurisdictional sense.

It is appellee's contention that there is no substantial Federal question in this case, and we respectfully submit

that this Court should not accept jurisdiction of the appeal.

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(7121)



Office Supreme Court, U.S. FILED

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CHARLES ELMORE CROPLEY

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 317:

THE DAY-BRITE LIGHTING, INC., Appellant,

STATE OF MISSOURI;

Appeal from the Supreme Court of the State of Missouri.

# APPELLEE'S STATEMENT, BRIEF AND ARGUMENT.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 317.

THE DAY-BRITE LIGHTING, INC.,
Appellant,

VS.

STATE OF MISSOURI,

Appeal from the Supreme Court of the State of Missouri.

# APPELLEE'S STATEMENT, BRIEF AND ARGUMENT.

II.

#### DECISIONS OF COURTS BELOW.

A. State v. Day-Brite Lighting, Inc., 220 S. W. (2d) 782, St. Louis Court of Appeals, 1949 (R. 25).

B. State v. Day-Brite Lighting, Inc., 240 S. W. (2d) 886, Mo. Sup., 1951 (R. 37).

#### III.

#### JURISDICTIONAL STATEMENT.

Jurisdiction of this Court was invoked under the provisions of Section 1257 (2), Pitle 28, United States Code Annotated, Chapter 646, 62 Stat. 929. The Appellee has previously filed its statement opposing the jurisdiction of this Court, and incorporates that statement in this brief by reference.

IV.

#### ARGUMENT.

#### A.

## Legislative History of Section 129.060, R. S. Mo. 1949.

The sole question presented in this case is the constitutionality of Section 129.060, R. S. Mo. 1949, which is as follows:

"Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so. absenting himself, be liable to any penalty; provided, however, that his employer may specify the hours during which such employee may absent himself as Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars.

This statute was first enacted in Missouri in 1°27 (Laws of Missouri 1897, page 108). In the Inaugural Address of Honorable Lon V. Stephens to the 39th General Assembly of the State of Missouri, the attention of the Legislature was called to the existence of an evil which was then prevalent throughout this country. Governor Stephens stated:

"I call the attention of your honorable body to the coercion of employees by corporations and other employers of labor with a view to influencing their political action. Such coercion raises a question more serious and more vital than the money question, the tariff question or any other economical question however important dividing political parties. The question it presents is whether a free popular government shall be maintained in the United States. If coercion, moral or physical, such as we witnessed in the last campaign is to go unrebuked, government by the people is nearing its end and we are entering on an era of government by an oligarchy of opulent employers. I recommend the enactment of such laws as will not only protect the voter in the free exercise of his franchise, but will make it perilous for any man to interfere with his right."

(Page 7, Inaugural Address of Governor Lon V. Stephens to the 39th General Assembly, found in Apendix, House and Senate Journals of the 39th General Assembly, 1897.)

Thereafter, in the 39th General Assembly, House Bill. No. 273 (Sections 129.060, 129.070 and 129,080, R. S. Mo. 1949) was introduced and the following comment relative

thereto is found in the House Journal, 39th General Assembly, at page 122:

"Mr. Bohart introduced House Bill No. 273, entitled 
"An act to amend an act entitled 'An act to prevent corrupt practices in elections, to limit the expenses of candidates and political committees, and provide penalties and remedies for violation of this act,' approved March 31, 1893, by inserting between sections 4 and 5 three new sections, to be known as sections

"Which was read first time.

4a, 4b and 4c;

"Mr. Bohart submitted report from a committee appointed to report a bill on corrupt practices, as follows:

"Mr. Speaker: Your committee appointed to prepare and report a bill to this House providing against corrupt practices in elections, should such bill be necessary to the full protection of all the rights and privileges of any voter in this State,

"Begs leave to report the following bill, which they believe will, in connection with other laws of this State, fully and amply protect the constitutional rights of any and all persons entitled to vote at any election in this State, to a free and unmolested exercise of the voting franchise."

A study of the legislative history of this bill as disclosed by the House and Senate Journals indicates that the particular section in question (Section 120.060) was amended in only one respect. That amendment is found in the House Journal, 39th General Assembly, at page 329, and is as follows:

"Amend the bill as introduced by striking out all between the words 'penalty,' in the 6th line, and the word 'provided,' in the 7th line of section 4a." Available records do not indicate the nature of the stricken matter. Other than as set out above, the only other references in the Journals to Section 129.060 are to formal matters during passage.

B.

The construction of a state statute by the State Supreme Court is binding upon the United States Supreme Court.

Throughout its brief Appellant argues that Day-Brite Lighting, Inc., did not violate the statute in question. The main contentions urged are that: 1) The statute is not applicable to hourly paid employees, and, 2) There was no deduction of wages of the complaining witness in this particular case.

However, this contention has been laid at rest by the proper Appellate Courts of the State of Misscari. The St. Louis Court of Appeals held that the Appellant was guilty of a violation of the deduction of wages section, and subsequently the Missouri Supreme Court ruled, in essence, that the statute was applicable to hourly paid employees and that the deduction of one and one-half hours' wages from the pay of the complaining witness was a violation of the provisions of the statute.

We think it unnecessary to set out a lengthy citation of authorities that the United States Supreme Court not only accepts, but is bound by the construction given to state statutes by the highest state courts. See Aero Mayflower Transit Co. v. Bd. of R. R. Commrs., 332 U. S. 495; Paterno v. Lyons, 334 U. S. 314.

It is also important to note that these contentions are not to be found in Appellant's specification of such of the assigned errors as are intended to be urged. Since these contentions are so ably disposed of in the Missouri opinions, and for the further reasons set out above, Appellee does not consider it necessary to further answer them.

We also desire to call the Court's attention to the fact that Appellant has drawn the issues by the statement in its brief (p. 7), which indicates that the only grounds which "need concern us here" are those relating to its contention, "that the statute violated Section 1 of the Fourteenth Amendment to the Federal Constitution by depriving Appellant of his property without due process of law; that it violated Section I of the Fourteenth Amendment by denying Appellant equal protection of the laws; and that it impaired the obligation of contracts in contravention of Section 10, Article I, of the United States Constitution."

C.

### Other assignments of error.

The Appellant filed its Assignment of Errors on August 14, 1951 (R. 70). Subsequently, the Appellant adopted its Assignments of Error as its statement of Points to Be Relied Upon (R. 74):

In its brief, the Appellant set forth the specific errors which were to be urged (p. 9). These errors do not contain those numbered 5, 6, 7 and 8 in the Assignment of Errors (R. 72). However, these assignments were considered and fully answered by the Appellee in its statement opposing jurisdiction and also under Point B. Because these assignments have been disposed of in such manner and in view of the Appellant's statement concerning the questions which it considers to be of moment in this case (Appellant's brief, page 7), we submit that such matters are not before the Court, and, therefore, do not further specifically answer the above-mentioned assignments.

Another Assignment of Error appearing for the first time since the inception of this case is Appellant's argument which seems to imply that this statute is violative of Article I, Section 2, and Article I, Section 4, of the United States Constitution. It is submitted that nowhere in this record other than in the Appellant's brief (p. 19) can there be found any mention of these constitutional provisions. It is well-settled by the opinions of this Court that federal questions raised for the first time on appeal are raised too late and this Court has no jurisdiction to determine the same (Mo. Pac. R. Co. v. Hanna, 266 U. S. 184; Rogers v. Clark Iron Co., 217, U. S. 589; Mallers v. Commercial Loan Investment Co., 216 U. S. 613).

In any event, Appellant points to no authority for its novel assumption and we submit that none of the cases interpreting these constitutional provisions support its view.

D.

In passing upon the constitutionality of an act the Court should indulge every presumption in favor of the constitutionality of the act, and the burden is on one assailing the constitutionality of legislation to prove this conclusion beyond all doubt.

The basic principle which underlies the entire field of legal concepts pertaining to the validity of legislation is that by enactment of legislation, a constitutional measure is presumed to be created. In every case where a question is raised as to the constitutionality of an act, the court employs this doctrine in scrutinizing the terms of the law. In a great volume of cases the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. Thus, the presumption of constitutionality of a statute dealing with a subject clearly within the scope of the police power

prevails in the absence of some factual foundation of record for declaring it to be unreasonable. All statutes are of constitutional validity unless they are shown to be invalid, and the courts will resolve every reasonable doubt in favor of the validity of the enactment. It has been said that every intendment is in favor of its validity, that it must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears or is made to appear beyond a reasonable doubt; and that it is only where its invalidity is made to appear clearly, plainly, palpably, and by irrefragable evidence, where the case is so clear as to be free from doubt or the act is manifestly in contravention of the Constitution, and where all in all invalidity is disclosed in such a manner as to leave no reasonable doubt that the courts will declare it unconstitutional. Every rational and reasonable presumption must first be indulged in favor of the validity of the act (11 Am. Jur., Section 128, page 776 ff).

In consequence of the general presumption in favor of the validity of acts of the legislature and the desires of the courts in resolving all doubts in favor of their validity, the rule has become established that courts will not search. the Constitution for express sanction or for reasonable implication to sustain a legislative enactment; the successful assailant must be able to point out the particular provision that has been violated and the ground on which it has been infringed. With regard to the duties cast upon . the assailant of a legislative enactment, the rule is fixed that a party who alleges the unconstitutionality of a statute normally has the burden of substantiating his claim and must overcome the strong presumption in favor of its validity. It has been said that the party who wishes to . pronounce a law unconstitutional takes on himself the burden of proving this conclusion beyond all doubt, and that a party who asserts that the legislature has usurped power or has violated the Constitution must affirmatively

and clearly establish his position. Consequently, those who affirm the unconstitutionality of an act of Congress must clearly show that the act is in violation of the provisions of the Constitution; it is insufficient merely to raise a doubt or show that the legislation is unwise (11 Am. Jur., Section 132, page 795 ff).

One of the most firmly established groups of principles which has become cardinal and elementary in the field of constitutional law is that the propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination. The courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seen to the court to be detrimental to the best interests of the state. The remedy for the correction of unwise legislation remains solely in the people who, by making the necessary changes in the legislative body, may have the improvident or pernicious legislation of one legislature corrected by its successors. In other words, the legislature is the judge of the necessity, utility, and expediency of the appropriation of private property to a public use (11 Am. Jur., Section 138, page 804 ff). -

The general rule is that the question of the reasonableness of an act otherwise within constitutional bounds is for the legislature exclusively, and that in ordinary cases the courts have no revisory power concerning it nor any power to substitute their opinion for the judgment of the legislature. Mere unreasonableness does not necessarily render a statute unconstitutional. This rule does not mean that constitutional guaranties can be violated by unreasonableness. Thus, the courts may inquire whether an act of Congress is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If, however, there is room for fair debate as to whether a municipal ordinance is arbitrary or unreasonable, the court will not substitute with the primary duty and responsibility of determining the question. Courts are not at liberty to declare statutes invalid although they may be harsh, unfair, abused and misused, may afford an opportunity for abuse in the manner of application, may create hardships or inconvenience, or may be oppressive, mischievous in their effects, burdensome on the people, and of doubtful propriety. The courts are not the guardians of the rights of the people against oppressive legislation which does not violate the provisions of the Constitution. The protection against such burdensome laws is by an appeal to the justice and patriotism of the people themselves on of their legislative representatives, (11 Am. Jur., Section 136, pages 802, 803):

E

The enactment of Section 129.060, R. S. Mo. 1949, is a constitutional exercise of the police power of the State.

By the enactment of Section 129.060, R. S. Mo. 1949, the General Assembly of the State of Missouri has voted to provide a means of insuring theogreatest possible participation by the people in the election of their officers and in the expression of their opinion on matters of public interest. There can be no question but that the exercise of the voting privilege is one which is clothed with a public purpose, and, with full recognition of this, the Missouri Legislature enacted the statute now being assailed.

If the Missouri Legislature were alone among the fortyeight states to have determined the necessity for such legislation it might be said that the factual situation furnishing the background therefor should be re-examined. However, as will be seen from a table appearing in the Appendix, the Legislatures of almost half of our sister states have seen fit to enact similar laws, which are designed to guarantee the untrammeled exercise of the voting privilege. Some sixteen or more of these statutes make it unlawful for the employer to dock an employee's wages during an absence under the statute. All the states have gone to great lengths to secure the right of the people to a free expression at the polls. Realizing that an evil in the form of employer domination existed, the chosen representatives of the people sought to correct this evil.

The method adopted was the exercise of the police power of the state, the power inherent in every sovereignty to protect not only its very existence, but also the security of the social order, the life and health of the citizens, the enjoyment of private and social life and the beneficial use of property.

No precise definition of the police power can be given, but the extent of its application has been stated by Mr. Justice Holares, as follows:

"It may be said in a general way that the police power extends to all the great public needs. Canfield v. United States, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. " ""

(Noble State Bank v. Haskell, 219 U. S. 104, l. c

In any consideration of the principle of the legitimate extension of the police power it must be kept in mind that, so far as the General Assembly of Missouri is concerned, the State Constitution is not a grant of power, but is a limitation of power, and the Legislature is free to de anything that is not forbidden by the State or Federal

Constitutions. Therefore, except for the limitations imposed by the Federal or State Constitutions, the power of the State Legislature is unlimited and practically absolute, and that, therefore, it covers the whole range of legitimate legislation.

Section 25, Article I of the Constitution of the State of Missouri, provides:

"That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

It was in keeping with the spirit of this mandate of the Constitution that Section 129.060, R. S. Mo. 1949, was enacted, and the Legislature, in effect, thereby declared that such legislation would more adequately secure free and open elections. This, we submit, was a valid exercise of the police power of the State, and one which, in principle, has the sanction of this Court.

F.

Section 129.060, R. S. Mo. 1949, is not unconstitutional as an impairment of the obligation of contract.

The Appellant sets forth a lengthy argument contending that the statute under consideration is an impairment of the obligation of contracts forbidden by Section 10, Article I, of the Constitution of the United States.

reasons. First of all, the constitutional protection of the obligation of contracts is necessarily subject to the police power of the state, and, therefore, a statute passed in the legitimate exercise of the police power will be upheld, although it incidentally destroys existing contract rights (12 Am. Jur., page 54, Section 421). In this connection see also the argument of Appellee under Point H.

This argument of the Appellant must fail for the further reason that the employment contract between the Appellant and its employees included the provisions of the laws in effect at the time of its making. The provision of the Constitution which declares that no state shall pass any. law impairing the obligation of contracts does not apply to a law enacted prior to the making of the contract, the obligation of which is claimed to be impaired, but to a statute of a state enacted after the making of the contract. The obligation of a contract cannot properly be said to be impaired by a statute in force when the contract was made, for in such cases it is presumed that it was made in contemplation of the existing law. Hence, a lease made subsequent to the enactment of a statute cannot be unconstitutionally impaired by such statute. The state, therefore, may legislate as to future contracts as it may see fit, and, accordingly, if a law is prospective only, it is valid. Although a statute tending to impair the obligation of a contract is inoperative as to contracts existing at the time of its passage, it may nevertheless be valid and operative as to future contracts (12 Am. Jur., pages 15, 16, Section. 387).

It is settled doctrine that the contract clause applies to legislation subsequent in time to the contract alleged to have been impaired (Munday v. Wisc. Tr. Co., 252 U. S. 499).

G.

Section 129.060, R. S. Mo. 1949, is not a denial of the equal protection of the law.

Although necessarily involved in the discussion of the due process clause, the Appellee desires to set out briefly its answer to Appellant's argument that Section 129.060, R. S. Mo. 1949, is a denial of equal protection of the laws.

At the cutset we desire to call the attention of the Court to the attitude of the Missonri Supreme Court as to the efficacy of this contention. "Section 11785 (129.060) is singularly free from the criticism leveled against it by this assignment. It applies with complete uniformity of duty and privilege, respectively, to all employers and to all employees, without regard to the method of computing their compensation" (240 S. W. [2d] 893).

The only case cited by Appellant to support its contention that this statute is a denial of the equal protection of the laws is that of Truax v. Corrigan, 257 U. S. 312. That case was decided in 1921 by a five to four decision with Justices Holmes, Pitney, Clarke and Brandeis dissenting. However, in that case both the majority and the minority opinions recognized the special classification of the relations of employers and employees as proper and necessary for the welfare of the community and requiring special treatment and as affording a constitutional basis for legislation applicable only to persons standing in that relation.

It is interesting to note the status of Truak v. Corrigan today. From the concurring opinion of Mr. Justice Frankfurter in American Federation of Labor v. American Sash and Door Co., 335 U. S. 538, it becomes obvious that Truax v. Corrigan has met the same demise as the Allgeyer-Lochner-Adair-Coppage constitutional doctrine. Under these circumstances it can hardly be said that the application of the admittedly valid classification by the majority of the Court in Truax v. Corrigan supports the contention of the Appellant.

Employers, as distinguished from employees, do not constitute a class within the constitutional prohibition against class legislation. A statute applying to all employers similarly situated is not open to such suggestion (12 Am. Jur., page 184, Section 503).

It must be kept in mind that the statute now being considered is applicable to every employer and every employee in the State of Missouri. It must also be remembered that this statute was enacted as the legislative answer to a serious evil, which was the domination of political life by employers.

A fundamental principle involved in classification is that it must meet the requirement that a law shall affect alike all persons in the same class and under similar conditions. If a classification in legislation meets the prerequisites indispensable to the establishment of a class that it be reasonable and not arbitrary, and be based upon substantial distinctions with a proper relation to the objects classified and the purposes sought to be achieved, as long as the law operates alike on all members of the class which includes all persons and property similarly situated, it is not subject to any objections that it is special or class legislation, and is not a violation of the Federal guaranty as to the equal protection of the laws (12 Am. Jur., page 144, Section 478).

Many other authorities could be cited to show how entirely free is this statute from the criticism leveled against it on the grounds of a denial of equal protection but the principles and authorities have been ably set forth in Carmichael v. Southern Coal & Coke Co., 301 U. S. 195, and Appellee respectfully submits that the opinion of the Court in Carmichael disposes of this argument.

: H.

Section 129.060, R. S. Mo. 1949, is not a deprivation of property without due process of law.

Under the most recent decisions of this Court, it is obvious that the attack of the Appellant upon this statute as a deprivation of due process because of an interference with freedom of contract is without merit. It is wellestablished that freedom of contract is a qualified right and not an absolute right and this qualification on the liberty of the freedom to contract has long been recognized. However, for a certain period, the United States Supreme Court permitted the philosophy of laissez faire to direct the course of the application of this principle. This has become known as the Allgeyer-Lochner-Adair-Coppage constitutional doctrine. It was used to strike down various enactments of State Legislatures seeking to curb abuses and provide remedies for the evils which were an aftermath of the industrial revolution. However, later decisions of this Court steadily rejected this doctrine so that eventually the whole thought implicit therein was discredited and replaced by a newer, more enlightened and more realistic viewpoint.

This Court beginning at least as early as 1934, when the Nebbia case was decided, has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate. against what are found to be injurious practices in their internal commercial and business affairs, so long . as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See Nebbia v. New. York, supra, at 523-524, and West Coast Hotel Co. v. Parrish, supra, at 392-395, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

(Lincoln Federal Labor Union et al. v. Northwestern Iron & Metal Co. et al., 335 U. S. 525, 1. c. 536.) As to freedom of contract, the Court definitely asserted that this was a qualified right and not an absolute right guaranteed by the Constitution under any and all conditions in West Coast Hotel Co. v. Parrish, 300 U. S. 379, wherein it was stated at l. c. 392:

many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day \* \* \*; in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages \* \*; in forbidding the payment of seaman's wages in advance in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine . . ; in prohibiting contracts limiting liability for injuries to employees in limiting hours of work of employees in manufacturing establishments \* . ; and in maintaining workmen's compensation laws . . In dealing with the relation of employer and employee, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. \* \* \*"

This Court also upheld the validity of the Minnesota Moratorium Law against the same constitutional objections as are being urged by the Appellant in this case. The Court recognized that the states retain adequate power which may be exercised for the promotion of the common weal, or which are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power is paramount to any rights under contracts between individuals (Home Bldg. & L. Ass'n v. Blaisdell, 290 U. S. 398, 437; see also Block v. Hirsh, 256 U. S. 135).

From the above, it is clear that Section 129.060 is a very legitimate exercise of the police power of the State of Missouri designed to provide for free and open elections.

When considering the constitutionality of state statutes under the due process clause, all that is necessary to sustain the validity of questioned acts is that they be a reasonable exercise of the police power. In the case of Noble State Bank v. Haskell, 219 U. S. 104, this Court stated, at l. c. 116:

"In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the lib-

erty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the lawmaking power.

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. \* \* In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. \* \* And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. . 576, 30 Mor. Min. Rep. 576. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

The Legislature has the power and often exercises it to levy taxes and collect money in order to expend that money for a public purpose. The Legislature is also free to impose the tax burden upon whomsoever it sees fit, as long as it remains within the limitations of the Constitution. It is well-recognized in the country that the tax burden is not equally distributed upon all persons, nor do all the persons who pay taxes receive equal benefits from the expenditure thereof. For example, free textbooks are distributed in most states to school children, and this has been held not to be a violation of any constitutional provisions. (See Cochran v. Louisiana State Board of Education, 281 U. S. 370.)

And it is not unusual for the states to require employers to provide the means for the carrying out of a public purpose even though in the process there is a payment to individuals. In the case of Carmichael v. Southern Coke & Coal Co., 301 U. S. 495, this Court said at l. c. 518:

"The end being legitimate, the means is for the legislature to choose. When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. " "Individual interests are aided only as the common interest is safeguarded." " ""

(See also Steward Mach. Co..v. Davis, 301 U. S. 548; Helvering v. Davis, 301 U. S. 619.)

In the case of Mountain Timber Co. v. State of Washington, 243 U. S. 219, the Supreme Court of the United States, in passing upon the validity of the Workmen's Compensation Act of the State of Washington, rather fully covered the argument on this point, and we set out at some length the quotation on that case:

"As to the first point: The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. Lawton v. Steele, 152 U. S. 133, 136, 38 L. Ed. 385, 388, 14 Sup. Ct. Rep. 499. 'The police power of a state is as broad and plenary as its taxing power.' Kidd v. Pearson, 128 U. S. 1, 26, 32 L. Ed. 346, 352, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. In Barbier v. Connolly, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Supt. Ct. Rep. 357, the court, by Mr.

Justice Field, said: 'Neither the (14th) Amendmentbroad and comprehensive as it is-nor any other Amendment, was designed to interfere with the power of the state sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.' \* \* \* It hardly would be questioned. that the state might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation, or as tending to encourage the performance of the public duty of defense. \* \* " (Emphasis ours.)

From the above cases, it is easily seen that the authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. Oftentimes in the sound discretion and judgment of the direct representatives of the people, legislation is sometimes thought to be necessary so as to encourage performances of public duties.

And in the instant case is found the following comment by the Supreme Court of Missouri, at 1. c. 892:

"If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also. The right of universal suffrage is the attribute of sovereignty of a free people. We accept as a verity that 'Eternal vigilance is the price of liberty.' For the vast majority the only opportunity to exercise that vigilance is in the polling place.

"That every citizen should be giver both the right and the opportunity to vote is a matter of public interest, and any law having for its purpose the guarantee of such right and opportunity should be upheld if it is possible to do so. Such we take it was the legislative purpose of the enactment of Section 11785. And the purpose or legislative intent was not to financially enrich the voter or to place an unnecessary and unreasonable burden on the employer. " " State v. Day-Brite Lighting, Inc., supra, 220 S. W. 2d, loc. cit. 785"

The right of a free people to participate in political affairs is illustrated by the decision of the Circuit Court of Appeals for the First Circuit in the case of Santiago v. People of Puerto Rico, 154 Fed. Rep. (2d) 811, wherein the Court stated at 1. c. 813:

It merely prohibits discrimination against a laborer on account of his political affiliation. If it is reasonable to prohibit an employer from interfering with his employees' right to participate in a labor organization, National Labor Relations Board v. Jones & Laughlin, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893. 108 A. L. R. 1352, it is at least no less reasonable to prohibit an employer from interfering with an employee's participation in a political party. Indeed, an employee's right to adhere to the tenets of the political organization of his choice is a basic right in any truly democratic society. To prevent discrimination by an employer against an employee because that employee chooses to join a particular political party serves to implement and enforce a right which is openly and proudly recognized and vigilantly defended in a democracy. Freedom of the employer is no more abridged in this instance than the freedom of the employer was abridged by the National Labor Relations Act. The statute as applied to the facts in the instant case does not constitute a violation of due process of law or of any clause of the Organic Act or Federal Constitution."

Similar legislation tending to encourage the performance of a public duty is that pertaining to privileges extended to veterans, and particularly we would like to call the attention of the Court to the provisions of the Selective Training and Service Act of 1940, and Section 8 thereof (50 U. S. C. A. Appendix, Section 308). It will be noted that this section requires an expenditure by employers by

guaranteeing to veterans certain benefits which may have accrued while the veteran was in the service of his country and while he was not rendering any direct service to the employer. See Fishgold v. Sullivan Dry Dock & Repair Court, 328 U. S. 275; Hall v. Union Light, Heat & Power Co., 53 Fed. Supp. 817; Mentzel v. Diamond, 167 Fed. [2d] 299).

Finally, it may be suggested that the only constitutional prohibitions or restraints which the Appellant has suggested for the invalidation of this statute are those notions of public policy imbedded in the early decisions of the United States Supreme Court, but which no longer have standing and are not the standards by which the constitutionality of economic and social programs of the states are to be determined (Olsen v. Nebraska, 313 U. S. 236).

I.

Collection of authorities dealing with the principle permitting employees time off for voting without penalty or deduction of wages.

Since the decision of the Missouri Supreme Court in the instant case, there has been a recent decision by the District Court of Ramsey County, Minnesota, in favor of the validity of the Minnesota statute providing for employees to absent themselves for the purpose of voting without a penalty of deduction from salary or wages. In a memorandum accompanying the finding of facts and conclusion of law, that Court stated that it had carefully read the authorities cited by the parties, and, in its opinion, the correct conclusion was arrived at by the Missouri Court. (See Appendix C.)

The decision in the instant case is also the basis for a comment in the November, 1951, issue of the Nebraska

Law Review (Vol. 31, No. 1, at page 97). Following an analysis of the authorities and the legal theory supporting the instant decision and those reaching an opposite conclusion, the writer of the comment concluded that the instant decision is clearly proper under existing rules of constitutional law as set forth by the United States Supreme Court.

In recent years the Courts which have considered the question of the constitutionality of statutes providing for time off to vote without penalty or deduction of wages have almost uniformly upheld the validity of such legislation. The only exception which research discloses is a decision by the Court of Appeals of Kentucky in the case of Illinois Central Railroad Co. v. Commonwealth, 204 S.W. (2d) 973 (1947). In that case, the Kentucky Court, after declaring its statute unconstitutional as in conflict with a provision of the Kentucky Constitution, went further to declare the statute unconstitutional as a denial of due process and equal protection of the laws. The Court based its conclusion on the authority of a case decided in 1923 by the Illinois Supreme Court (People v. Chicago, M. & St. P. Ry, Co., 138 N. E. 155, 306 Ill. 486 [1923], 28 A. L. R. 610). The Illinois Supreme Court had declared invalid a statute containing similar language, but it seems worthy of note that the Court seemed to rest the entire matter on the proposition that the employee was engaged in a matter wholly limited to his own personal welfare. The Court failed to recognize the obvious contribution to the general welfare by the broadening of the base of the electorate.

The holding of the Illinois Supreme Court remained the law in that State until the decision of the Illinois Supreme Court in the case of **Zelney v. Murphy**, 56 N. E. (2d) 754, 387 Ill. 492 (1944), which upheld the validity of the Unemployment Compensation Act of Illinois. When urged to apply the reasoning of the 1923 decision the Court

recognizing the trend of judicial thought in similar matters, refused to follow its earlier decision, stating as follows, at 1. c. 757:

"it is urged that the State may not take private property nor money for a private use and that the act as a whole violates sections 1, 2, 13 and 20 of Article II of the State constitution and section I of the fourteenth amendment to the Federal constitution; and the case of People v. Chicago, M. & St. P. R. Co., 306 Ill. 486, 138 N. E. 155, 158, 28 A. L. R. 610, is cited in support, of such contention. The statute there, as questioned, provided a penalty for any employer who made a deduction in wages for a period of two hours used by such employee in voting at any general or special election and the court held that it was not the constitutional right of any citizen to be paid for the time consumed in exercising the right to vote. The court further said: "No exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process and equal protection" of the laws.' This holding was approved in McAlpine v. Dimick, 326 Ill. 240, 157 N. E. 235. However, this statute, re-enacted and amended from time to time, still contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The growing complexity of our economic interests has inevitably led to an increased use of regulatory measures in order to protect the individual so that the public good is reassured by safeguarding the economic structure upon which the good of all depends." (Emphasis ours.)

In comment upon the opinion of the Supreme Court of Illinois in Zelney v. Murphy, the editor of the C. C. H. Labor Law Journal in the issue for June, 1950 (Vol. I, No. 9), said, l. c. 751:

(In the 1923 case, the Illinois Supreme Court did hold unconstitutional a prior provision that no deduction could be made from the employee's usual salary or wages on account of the time off allowed for voting. Nevertheless, this provision was re-enacted without substantial change in 1933, and again in 1943, and the Illinois Supreme Court has not directly passed upen either re-enactment. However, in a recent case under the Illinois Unemployment Compensation Act in Zelney v. Murphy, C. C. H. Unemployment Insurance Reports, Ill. § 8212 (September 19, 1944), the Illinois court referred to its 1923 decision, and in declining to apply that rule to the Unemployment Compensation Act, indicated that a more liberal interpretation might be made at this time. There is, therefore, no assurance that the current provision against deduction from an employee's usual salary or wages for time off to vote would again be held unconstitutional.-Editor.)"

This indication of a changed attitude on the part of the Illinois Supreme Count, has also been noted in a leading law review article on the principle involved in the instant case. See 47 Columbia Law Review 135.

However, the Kentucky Court failed to note this change in judicial attitude and thus, we submit, based its decision on a holding in an Illinois case which has since been repudiated by the Illinois Supreme Court.

In the case of **People v. Ford Motor Co.**, 63 N. Y. S. (2d) 697, 271 App. Div. 141 (1946), the Appellate Division of the Supreme Court of the State of New York upheld the constitutionality of a similar statute stating as follows:

"The statutes in question, in force for more than half a century, deal directly with a detail as to the exercise of the elective franchise—a subject matter which, under our form of government, is in itself a primary act of sovereignty. To take measures to insure the full and free performance of that act is therefore in the interest of the general welfare, and as such may be said to call forth 'society's natural right of self defense' which is inherent in sovereignty itself and which has been generally termed the police power. 11 Am. Jur., Constitutional Law, Sec. 247, p. 973. In Barrett v. State of New York, 220 N. Y. 423, at page 428, 116 N. E. 99, at page 101, L. R. A. 1918C, 400, Ann. Cas. 1917D, 807, it is stated:

"The state may exercise the police power "wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Lawton v. Steele, 152 U. S. 133, 136, 14 S. Ct. 499, 501, 38 L. Ed. 385.

"An employer-employee relationship may be said to have in it such a power of dominance on the part of the employer as is capable of thwarting the wholesome exercise of the right to vote at an election. The fact that such abuses have occurred is historical. To avoid such evils, to encourage the right of suffrage, to keep it pristine and render it efficient—all this pertains to the public welfare and, in the attainment of those

objectives, the burden which the statutes cast upon all in the role of an employer is one lawfully placed in a design for the common good, and the burden is so slight that it may not be said to be unduly oppressive. That the burden may bear unequally does not render its placement unlawful. Chamberlin, Inc., v. Andrews, 271 N. Y. 1, 2 N. E. 2d 22, 106 A. L. R. 1519."

(In the dissenting opinion of Mr. Justice Black in the case of United Public Workers v. Mitchell, 330 U. S. 111, 91 L. Ed. 754, is found the following, l. c. 778: "The right to vote and privately to express an opinion on political matters, important though they be, are but parts of the broad freedoms which our Constitution has provided as the bulwark of our free political institutions." Popular government, to be effective, must permit and encourage much wider political activity by all the people. \* \* \* \* " "Note 6 — Some states require that employers pay their employees for the time they spend away from work while voting. See People v. Ford Motor Co., 271 App, Div. 141, 63 N. Y. S. 2d 697; Note, Pay While Voting, 47 Col. L. Rev. 135 [1947].")

Although the Court did not directly consider the constitutionality of the New York time off for voting statute, that statute was involved in the case of Lee v. Ideal Roller & Manufacturing Co., 92 N. Y. S. (2d) 726, wherein the Court stated, at I. c. 730:

"Section 226 of the Election Law was enacted to protect the earning capacity of employees (voters and their standing and position in their place of employment which is so vital to the maintenance and continuance of free elections. Any deprivation of income to the voter which he would otherwise normally receive would be in violation of this statute.

"It is conceded by the defendant that if the plain tiffs had actually worked eight hours on Election Day,

with two additional hours off to vote, the plaintiffs would be entitled to two hours pay at overtime rate for that day. In other words, the two hours voting time off allowed on Election Day would be included in the computation of overtime pay for that day as . time worked. The Attorney General is of the opinion that employees who absent themselves on Election Day are entitled to receive the same wage they would have received had they actually remained on the job. Opinion, Attorney General, January 15th, 1941. The section of the Election Law in question applies to weekly, daily, hourly or piece-work wage earners, and no deduction may be made in wage or salary paid any such employee by an employer for the two hours absence during voting time on Election Day. Opinion, Attorney General, January 15th, 1941." (Emphasis ours.)

The constitutionality of the California statute on this question was upheld in the case of Ballarini v. Schlage Lock Co., 226 Pac. (2d) 771. See also Kouff v. Bethlehem Alameda Shipyard, 202 Pac. (2d) 1059.

So far as can be ascertained, the most comprehensive discussion of the constitutionality of statutes permitting employees time off for voting is to be found in a note in 47 Columbia Law Review 135. Because of its very concise and lucid presentation, we have set out somewhat extensively the thought of this article in the Appendix.

# CONCLUSION.

Upon this appeal the Appellant has assailed the constitutionality of Section 129.060, R. S. Mo. 1949. It is a fundamental rule that all statutes are presumed to be of constitutional validity unless repugnancy to the Constitution clearly appears or is made to appear beyond a reasonable

doubt. In this connection the rule is fixed that a party who alleges the unconstitutionality of a statute takes on himself the burden of proving this conclusion beyond all doubt.

It is a cardinal principle in the field of constitutional law that the propriety, wisdom, necessity, utility and expediency of legislation are exclusively matters for legislative determination and Courts will not invalidate laws otherwise constitutional for any reasons such as these? The remedy for the correction of unwise legislation remains solely in the people and is not within the province of the Courts. This is so even though statutes may be harsh, unfair, abused and misused, or may create hardships or inconvenience. A Court is not free to substitute its own judgment for that of the legislative body in the determination of the reasonableness of a statute even though it may appear to the Court to be detrimental to the best interest of the state. That is the prerogative of the Legislature and in a system of divided powers such as ours so it must remain.

We believe it has been clearly shown that the constitutional doctrine which the Appellant seeks to have the Court apply in the instant case is one which has been expressly overruled and is no longer considered as a standard for the determination of the constitutionality of legislation. The Appellee has fully answered the argument of Appellant and submits that Section 129.060 is a valid exercise of the police powers of the state.

In conclusion, the Appellee respectfully submits to this Court that the Appellant has failed to overcome the presumption of the constitutionality which attaches to an enactment of the Legislature, and, further, the Appellee has clearly shown that under applicable principles of constitutional law, Section 129.060 is valid in all respects,

therefore, we pray this Court to affirm the judgment entered below.

Respectfully submitted,

J. E. TAYLOR,

Attorney General of Missouri,

JOHN R. BATY,

Assistant Attorney General of Missouri.

Supreme Court Building, Jefferson City, Missouri, Attorneys for Appellee.

# APPENDIX.

The following is a table listing states which have statutes similar to Section 129.606, R. S. Mo. 1949, and a tabu-

	of the principal feat Law Journal, May	tures thereof (taken issue, 1950):	Can Employee Be Docked?
Alabama Alaska Arizona Arkansas California	no provision no provision two hours after quitting time (not lefer than 4 P. M.) two hours	specified by employer specified by state  not specified; election officers may be alternated and without shapension or discharge	general election—no law not specific  O general election—no direct primary—no presidential primary—no
Colorado Connecticut Delaware D. of C. Florija	no provision no provision no provision no provision	specified by employer	general election—no, un- less say is by the hour
Georgia Hawali Idaho Illinois Indiana	no provision no provision no provision two hours four hours	specified by employer mutual agreement	general election—no general, national, state or county election—
Iowa Kansas Kentucky	two hours two hours four hours	specified by employer specified by employer specified by employer	general election—no general election—no all elections—yes

not specified

Louisiana

Maryland

Maine

no provision

no provision

"reasonable" time, not

over four hours

Massachusetts two hours first two hours after opening of polls Michigan no provision Minnesota law not specific specified by state "dur- all elections-no ing the forenoon" Mississippi no provision

not specified

State	Length of Time	Hours of Absence	Can Employee Be Docked?
Missouri	four bours 🤝	specified by employer	all elections—no 6
Montana	no provision		
Nebraska	two hours	specified by employer.	all election no
Nevada	three hours in places	not specified	not specified
٥	that operate on legal holidays; otherwise		
(4)	all day		
New Hampshire	no provision	11	
New Jersey	no provision		
New Mexico	two hours	specified by employer	no
New York	two hours; special rules for primaries	employer may specify o hours	not if voter uses two hours specified or if
			hours are not speci-
0			fled by employer
North Carolina	no provision		
North Dakota	no provision	0.	•
Ohio	two hours	specified by employer	all elections—no
Oklahoma	two hours, unless more time is needed	precified by employer	not specified
Oregon	no provision		
Pennsylvania	, no provision		**************************************
Puerto Rico	no provision		
Rhode Island	no prevision		
South Carolina	no provision	1 1	0
South Dakota	two hours	specified by employer	all almostana
Tennessee	no provision	specified by employer	all elections—no
Texas	"reasonable" and		
44	"fair"	specified by employer	statute—no Atty. Gen. Op.—yes
Utah .	two hours	specified by employer	general election—no, un less pay is by the hour
Vermont :	ono provision		
Virginia	no provision		0
Washington	no provision		6-3
West Virginia	three hours, unless more is necessary	not specified	"primary or convention"
Wisconsin.	three hours; special	annulated by applement	
V ISCOUBILI-	for "cities of the	specified by employer	yes
	first class" in city primaries	€.	
Vyoming	one hour other than lunch hour	not specified	all elections—no

B

The following is from a note in 47 Columbia Law Review 135, beginning at page 137:

"The problem of pay while voting should be considered against its proper background of constitutional decisions in the field of labor regulation. The primary problem posed is one of due process, as the equal protection and the contract clauses of the Constitution no longer appear to offer barriers to the statutes, but are principally used for the purpose of bolstering a due process attack upon the constitutionality of such legislation.

"There is ample precedent for the proposition that, in the public interest, the legislature can interfere with freedom of contract in regard to agreements between employers and employees without violating due process requirements. Statutes regulating the time, manner and amount of payment of employees have on many occasions withstood constitutional attack. The employer can be required to pay his employees at fixed periods, and to pay them in cash instead of scrip. In 1937 the Supreme Court swept away the constitutional barriers to minimum wage legislation in West Coast Hotel Co. v. Parrish, overruling earlier views that such regulations interfered with freedom of contract and thus violated due process.

"The pay while voting requirement bears a considerable resemblance to minimum wage legislation. There is a marked similarity between requiring an employer to pay a minimum wage totaling a fixed amount per week for 40 hours work and compelling him to pay the same amount for 38 hours work during a particular week in the year. The chief differences are in the purposes of the legislation, and the requirement of payment for a period in which the employee performs no services.

"The fact that the employer is compelled to pay wages for a period of time during which the employee performs no services presents a novel problem, which would assume even broader proportions if legislation requiring employers to grant vacations with pay were passed in this country. The contention that eminent domain principles are applicable is likely to be rejected. Many statutes imposing a financial burden upon employers, without compensation, have been upheld as a valid exercise of the regulatory power.

"There has in recent years been a substantial expansion of the interests in the advancement of which state legislatures may take action under the regulatory power. The conception of public welfare, which is recognized as an end justifying the exercise of this power, has been extended and the broader conception would furnish the basis for sustaining a statute designed to promote the full exercise of the right of suffrage. Certainly, if the economic and physical wellbeing of the community are important considerations warranting the use of the legislative power there is no reason why its 'political' welfare should not be accorded similar protection. Exercise of the right to vote is the most basic function of self-government and its importance has been re-emphasized in recent decisions of the courts. Some democratic countries have even/gone so far as to make the casting of a ballot a legal duty.

of the constitutionality of statutes regulating economic matters. Whatever may be the wisdom of pay while voting statutes, they do not appear so arbitrary or unreasonable as to violate dre process requirements. The burden imposed of the employer is relatively slight and the interest subserved, the right to vote, relatively high. Although it may be contended that the

measures are not actually required to promote the announced ends, since the employee's right to vote can adequately be protected by assuring him sufficient time off without compensation, this question of choice of means is best left to legislative judgment. The present reluctance of the courts to substitute their judgment in the economic realm points the way to the constitutionality of pay while voting statutes."

C.

For the convenience of the Court the Appellee sets forth the proceedings of the following case taken from a certified photostat of the original Findings of Fact, Conclusions of Law and Memorandum, dated the 20th day of December, 1951, and attested to by the Deputy Clerk of Ramsey County, State of Minne ta:

DISTRICT COURT, SECOND JUDICIAL DISTRICT.

File #271418.

State of Minnesota, County of Ramsey.

S. A. Erikson, J. P. Phillips, H. J. Wigley and D. W. Feterson on their own behalf and on behalf of other persons similarly situated,

— Plaintiffs.

V8.

// Northern Pacific Railway Company, / Defendant.

# FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter came on for hearing before the Court without a jury on the 12th day of December, 1950. William D. Gunn, Esq., appeared for the plaintiffs, and Messrs. M. L. Countryman, Jr., Esq., E. F. Requa, Esq., and F. S. Farrell,

Esq., as counsel for the defendant. The case was submitted to the Court upon a written stipulation of facts, and the exhibits referred to in said stipulation were offered in evidence. Objections were made by the plaintiffs to the materiality of the exhibits, and the same were received subject to the objections, and subject to a motion to strike. The objections to the introduction of the exhibits are hereby overruled, and the motion to strike the same is denied.

The Court adopts as his

# Findings of Fact

the stipulation of facts filed herein, and the exhibits therein referred to, and the Court finds the facts to be in accordance with the said stipulation, and the exhibits.

### Conclusions of Law

the Court finds that the plaintiffs are entitled to a declaratory judgment, or judgment of declaration, that the plaintiffs, and other persons for whom this action is brought, are entitled to compensation for the periods during the forenoon of November 2nd, 1948, during which they absented themselves from work for the purpose of voting in a State election held on that day, but only for such period of time during the said forenoon that they reasonably and necessarily needed for said purpose, and that Sec. 206.21, M. S. '45, now known as Sec. 206.21, M. S. '49, is a valid and constitutional statute of the State of Minnesota, and further that the plaintiffs are entitled to judgment for their costs and disbursements herein.

Let Judgment Be Entered Accordingly.

A stay of forty days is entered.

Dated May 31, 1951.

Arthur A. Stewart,
District Judge.

# Memorandum.

This action is brought under the provisions of Sec. 206.21, M. S., which reads as follows:

"Every person entitled to vote at an election shall be permitted to absent himself from his work for that purpose during the forenoon of each election day, without a penalty or deduction from salary or wages on account of such absence."

The defendant contends that the act should be construed so as not to apply to employees who are compensated for their services on an hourly, piece or commission basis, the employees/in question all being paid under a contract providing for compensation figured on an hourly basis. The act, in similar forms, has been on the statute books of Minnesota since 1893. There have been several amendments in the interim. The defendant quoted, in support of its argument, two letters of the Attorney General directed to the Minnesota Federation of Labor in 1921 and in 1922. These two letters of the Attorney General support the defendant's argument. However, there was a later opinion by the same officer addressed to the City Attorney of Minneapolis in November, 1950, which does not follow the opinions expressed in the former letters of the Attorney General.

The practical construction of a law by the authorities charged with its enforcement, and by the public generally, is an element of importance to be considered by the Court in determining the meaning of an ambiguous statute. It does not seem to me that there is any ambiguity in this statute. It plainly says that there shall be no penalty or deduction from salary or wages on account of such absence. Some Courts have attempted to make technical distinctions between salary and wages, but what appeals to me to be the better line of reasoning by the Court is that the two words are synonymous when used together,

and intended to cover all compensation for services rendered by an employee to his employer. (See Words and Phrases-title "Wages") Furthermore, the letters of the Attorney General are not opinions directed to any state official or any city or county official charged with the enforcement of the law, but are merely expressions of opinion addressed to the Federation of Labor. On the other hand, it appears from the stipulation that the parties in this case had previously contracted in substantially the same language as the contract of employment now before the Court, and under the previous contracts the defendant has paid employees for the time taken off to vote. In fact it has in the past paid employees of the very type covered by this action. The defendant and its employees have, for a long time, accepted the act as a binding act, and apparently treated it as part of their contract.

The principal argument of the defendant is directed at the constitutionality of the act. Although acts of this kind exist in and about one-third of the states, there is a very small number of authorities on the subject of their constitutionality, and there is division among those authorities. It would serve no useful purpose for a trial judge to write an exhaustive opinion on a subject of this kind. The Court has carefully read the authorities cited by the parties, and in its opinion the correct conclusion was arrived at by the Missouri Court.

Stewart, J.

Office - Supreme Court, U. S. LIFTARY SUPREME COURT, U.S DEC 28 1951 IN THE a CHARLES ELMORE CROPERS Supreme Court of the United States OCTOBER TERM, 1951 No. 317 BAY-BRITE LIGHTING, INC., A Corporation, Appellant, STATE OF MISSOURI. Appellee. On Appeal from the Supreme Court of Missouri

BRIEF OF AMERICAN FEDERATION OF LABOR

AMICUS GURIAE

HERBERT S. THATCHER, S JAMES A. GLENS, JOSEPH E. FINLEY,

J. ALBERT WOLL.

736 Bowen Building, Washington 5, D. C.

Counsel for American Federation of Labor.

D.

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### IN THE

# Supreme Court of the United States october term, 1951

# No. 317

DAY-BRITE LIGHTING, INC., A Corporation,

Appellant, .

STATE OF MISSOURI.

Appellee.

# On Appeal from the Supreme Court of Missouri

# BRIEF OF AMERICAN FEDERATION OF LABOR AMICUS CURIAE

#### STATEMENT

The American Federation of Labor has requested and been granted by the parties leave to file a brief amicus curiae in this case. Its interest lies in the face that it represents hundreds of thousands of employees who are the beneficiaries of laws in the State of Missouri and in the fifteen other states providing opportunities for workers to exercise their right of suffrage without deductions from pay for time thus lost.

### ARGUMENT

# THE STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Appellant contends that the statute involved deprives it of its property without due process of law in violation of the Fourteenth Amendment, This Court has many times delineated the permissible scope of state legislation under the due process clause. West Coast Hotel Co. v. Pa. rish, 300 U.S. 379; Nebbia v. New York, 291 U.S. 502; Lincoln Federal Labor Union No. 1912, et al. v. Northwestern Iron & Metal Co., et al., 335 U.S. 525; cf. dissenting opinion of Justice Frankfurter in West Virginia v. Barnette, 319 U.S. 624. These decisions indicate that the Court, in considering

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the validity of the state law in question under the Fourteenth Amendment, is concerned only with the following questions: (A) Is the promotion of a full exercise of the right of suffrage a proper concern of the legislature in that the interest of the public requires such promotion, and (B) Were the means adopted by the legislature reasonably necessary for the accomplishment of its purpose! Both questions must be answered in the affirmative.

# A. The Promotion of a Full Exercise of the Right of Suffrage is a Proper Concern of the Legislature.

The states, of course, may legislate on every matter of public concern. Noble State Bank v. Haskell, 219 U.S. 104, at 111. It is readily apparent in a democratic form of government that protection and encouragement of the exercise of the right of suffrage is fundamental to the perpetuation of that government. It is unnecessary to dwell upon the virtues of voting or the necessity for casting a ballot. Legislatures have enacted hundreds of statutes covering every phase of the electoral process. A more reasonable field for the legislative purview could hardly be found.

The legislature of the state of Missouri recognized this fact when it enacted Section 11785 in 1897. Sixteen other states have passed similar laws providing for time off for voting without a reduction in pay. Other states have chosen other methods for protection of the full exercise of the right of suffrage.

The Supreme Court of Missouri, when it decided the instant case below, briefly stated the public interest involved, at 240 S.W. (2d) 886, 892.

"If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also. The right of universal suffrage is the attribute of sovereignty of a free people. We accept as a verity that 'Eternal vigilance is the price of liberty.' For the vast majority the only opportunity to exercise that vigilance is in the polling place."

To this finding, few would take exception. The dissenting judges in the case below did not frame their objections on the right of the state to enact laws to protect the exercise of the franchise, but limited their disapproval to the means chosen by the legislature to carry out this plan.

### B. The Means Adopted by the Legislature Were Reasonably Necessary for the Accomplishment of its Purpose.

Whether or not the means adopted by the state of Missouri to assure the fullest participation of its voters in the electoral process were wise is no concern of this court. California State Automobile Association Inter-Insurance Bureau v. Maloney, 341 U.S. 105. If the law has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory, the requirements of due process are satisfied. The legislature is primarily the judge of necessity of the statute. Every possible presumption is in favor of its validity. It may not be annulled unless palpably in excess of the legislative power. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398.

To determine the reasonableness of a legislative enactment, it is necessary to view the circumstances existing at the time of the passage of the statute. Any other rule than this, such as determining the reasonableness of the statute by presently existing conditions, would require the court to sit as an arbiter in changing social trends. It would be required to substitute its judgment for that of the legislature on conditions calling for exercise of the law-making power. This is not a judicial function but one peculiarly adapted to the legislature. Thus, if appellant feels that the statute involved is unreasonable by today's standards, it has addressed its appeal to the wrong forum. The legislature of the state of Missouri can amend or repeal this statute any time a majority of its members is persuaded of the necessity therefor.

Section 11785 was enacted in 1897 and remained on the statute books of Missouri from that time to the present.

The fact that this is the first prosecution brought under the Act is of no consequence. If Section 11785 was a reasonable enactment under the conditions existing in 1897, it was a valid exercise of the legislative power and should not be disturbed by any court of law.

Legislators who sat in the Missouri Assembly in 1897 were presumably aware of the social conditions that prompted their action. In that year, throughout the United States, the average hours worked per week by employees in all industry was 59.4 per workingman.1 In that year, in Missouri, according to Bulletin No. 604; Bureau of Labor Statistics, laborers, blacksmiths, boilermakers, iron molders, printers and cabinetmen worked a maximum of 60 hours per week. In the neighboring state of Kansas, in 1867, stationary engineers worked a maximum of 98 hours, bakery workers 85 hours, farm laborers 112 hours, millwrights 77 hours, coal miners 72 hours, railroad brakemen 84 hours, teamsters 103 hours, and coopers a maximum of 70 hours. The cited source carried no figures available for Missouri, but it is a fair presumption that there was no great/dissimilarity. In any event, it is known that the protections against employer excesses and against abuse by employers. of their superior economic position were not then what they are today; even where the customary working hours may not have been long enough to interfere with the right of franchise, it was perhaps not unheard of for an employer to require its employees to work extra hours for the very purpose of defeating that right.

Even where the length of his working day was not such as to physically interfere with the right to vote, a workingman heavily dependent upon his earnings to support his family could ill afford a deduction in pay for any reason. Confronted with a choice of refraining from voting or

Douglas, Paul H., Roal Wages in the United States, 1890-1926, Houghton-Miffin Co., 1930.

bringing home a smaller paycheck, many workingmen would, stay at their jobs.

A legislature aware of those facts could hardly be called unreasonable when it undertook to widen the exercise of suffrage by permiting workingmen to absent themselves from employment for a four-hour period during an election day. The means established by the legislature to widen the exercise of suffrage were not only eminently reasonable, but absolutely necessary, if the desired object was to be achieved.

One of the dissenting opinions below, 240 S.W. (2d) 886, 897, states that the privilege accorded by the statute is not one of voting, but the privilege of absence for four hours, and that the employer could be punished for a deduction whether the employee voted or not. Such an argument, however, forgets that no persons are required to vote, but have merely the privilege of voting. The legislature had a right to provide each man with the fullest freedom necessary in which to exercise this privilege of

In such case, exhortations such at the following, by those jurists who held a similar statute in the state of Kentucky unconstitutional on the ground that it subsidized what in reality was the workingman's duty, must have fallen on deaf ears.

<sup>&</sup>quot;This glorious country belongs to the farmers, to the working people, to The little people whose name is legion, to the middle-sized people who are the salt of the earth, to those of the big people who would yet remain little people because their God-fearing hearts make them humble. No group in America has a greater stake in its government, in its rocks and hills, in its woods and templed hills, than ordinary working men. No group in America can be more interested in voting for a clean, righteous, free statesmanlike government than that group known as workers. The woman with the sunbonnet and the checkered apron who trudges off to the mountain-side in Leslie County and Talks down the creek a mile to cast her vote she is an American queen in calico, but her only pay for voting is the satisfaction of knowing that Columbia, by God's help hers, shall continue as the gem of the mighty ocean. Let no man cease to thank his God as he looks in at the open door of his voting place, as he realizes that here his quantity, though cast in overalls, is exactly the same as the quantity of the President of the United States. There is a satisfaction and privilege in voting in a free country that cannot be measured in dollars and cents." (Illinois Central Railroad v. Kentucky, 305 Ky. 632, 204 S.W., (2d) 973, 9.)

suffrage. Without freedom to go to the polls, the question of whether a citizen chose to vote or not becomes rather academic. The legislature selected the most practical, or certainly a reasonable, means of providing the necessary free time.

The contention made in the dissent below and in other court decisions that such a statute pays a man for voting is equally untenable. The statute does not require paying a person for voting. The statute prohibits a deduction from his wages because of the exercise of the privilege of election-day absence. Neither an employer of salaried employees nor the salaried employee would consider that his four-hour absence was parament for the privilege of voting, although there is no deduction from his monthly salary check. An hourly-paid employee should not be penalized because his earnings are computed in relation to the time actually worked each day,

Payment or not, such a statute necessarily imposes a burden on some party, as long as it be conceded that permitting absence from work is a proper method for carrying out the legislative purpose of promoting the wider exercise of the right to vote. If the employer pays his employees during their absence, he is compelled to suffer a financial loss. If the employee leaves his job to vote and suffers a deduction in pay for the period absent, he is suffering a financial loss. Forced to choose between the two, who is there to say the legislature has made an unreasonable choice in imposing the burden where it could more easily be borne, particularly since the burden placed on the employer is infinitesimal. An employee who worked 60 hours per week in 1897 and absented himself twice for the full four-hour period would still be gone no more than twenty-

People v. Chicago, Milwaukee & Dt. Paul Railway Co., 316 Ill. 486, 138 N.E. 155; McAlpine v. Dimick, 326 Ill., 240, 157 N.E. 235; Illinois Central Railroad v. Kentucky, 305 Ky. 632, 204 S.W. (2d) 973.

five hundredths of one per cent of his annual working time.

The employer who worked his teamsters 103 hours per week would suffer even less of a deprivation:

Even judged by today's standards, and as applied to the appellant employer in the case at hand, the burden is The statute as applied does not require that the employer pay for four full hours of an employee's absence. The statute provides only that an employee may be absent for a period of four hours between the opening and closing of the polls. The employer may specify the hours at which the employee may be absent. In this case, Grotemeyer left his job at three o'clock in the afternoon, at his employer's instruction, four hours before the polls closed at seven o'clock. Since his normal working time extended to four thirty p.m., he was actually absent only one and one-half hours. The purpose of the statute to secure four full hours between the opening and closing of the polls, affording a fair opportunity for the casting of a ballot, was thus carried out.

When the small pecuniary deprivation of the employer is placed alongside the public interest to be served by a full and complete electoral process, it becomes even clearer that the legislative action was reasonable in every respect. "(I)t is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." Noble State Bank v. Haskell. 219 U.S. 104, 110.

Appellant has relied upon the decisions of the highest courts of Illinois and Kentucky holding similar statutes unconsitutional. The reasoning of those decisions is not persuasive, as neither court gave proper deference to the legislative judgment.

The Supreme Court of Illinois, in 1923, first declared its statute to be unconstitutional. People v. Chicago, Milwau-

kee & St. Paul Railway Co., 316 III. 486, 138 N.E. 155. That decision was made in an era in which this Court was regularly finding state legislation to be violative of the Fourteenth Amendment's due process clause. Lockner v. New York, 198 U.S. 45; Adair v. United States, 208 U.S. 161; Coppage v. Kansas, 236 U.S. 1; and Adkins v. Children's Hospital, 261 U.S. 525, were the prevailing constitutional doctrines of the day. Under the influence of those decisions, it could be expected that the highest court of Illinois would brush aside legislative action when it offended the court's sense of propriety.

But the Lochner-Adair-Adkins cases are no lorger the ruling law. Acts of the legislature, when found rememble, are no longer invalidated because minor deprivations must necessarily be placed on some elements of the body politic for the common good. The Supreme Court of Illinois, properly responsive to the constitutional times, recognized this in 1944 when it handed down its decision in Zelney v. Murphy, 387 Ill. 492, 56 N.E. (2d) 754. That case involved the validity of the Unemployment Compensation Act of Illinois,

<sup>\*</sup>See opinion of Black, J., Lincoln Federated Labor Vnion v. Northwestern Iron and Metal Co., 335 U.S. 525, at 535:

<sup>&</sup>quot;The Allgeyer-Lochner Adair Coppage constitutional doctrine was for some years followed by this Court. It was used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities. . . .

<sup>&</sup>quot;This Court, beginning at least as early as 1934, when the Nebbia case was decided, has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

The same principles\_that are applied to state regulation of commercial and business affairs can be applied to regulation of voting, which concerns the preservation of the state itself.

and one of the arguments advanced against its constitutionality was the 1923 Illinois decision in People v. Chicago, Milwaukee & St. Paul Railway, supra. In dismissing that decision and one which followed it, the court said:

These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The growing complexity of our economic interests has inevitably led to an increased use of regulatory measures in order to protect the individual so that the public good is reassured by safeguarding the economic structure upon which the good of all depends."

The Court of Appeals of Kentucky, in 1947, declared a similar statute unconstitutional as a due processical ation. Illinois Central Railroad v. Kentucky, supra. With all due respect to the Kentucky court, its reasoning was on a par with its rhetoric. Whether or not the legislative action was within the bounds of reasonable judgment was not discussed. From a careful reading of the opinion, the decision appeared to rest on the court's personal distaste for the law. It was condemned thusly: "It does not seem to be in keeping with the American tradition." The court treated the penalties for pay deduction as a provision for pay for voting and found this highly offensive. The Kentucky decision is neither controlling nor persuasive.

Two other state courts have found similar statutes reasonable enactments of the legislature and have upheld them against charges of unconstitutionality. Those decisions, from New York in People v. Ford Motor Co., 63 N.Y.S. (2d) 697, and California, Ballarini v. Schlage Lock Co., 226 P. (2d) 771, are more nearly in keeping with the constitutional rulings advanced by this Court. Both statutes were affirmed as reasonable enactments of the legislature. Cf. 47 Columbia Law Review 135

When appellant's argument is contrasted with the reasonable exercise of legislative power, it is no more than an

appeal to constitutional doctrines long ago laid to rest by this Court. The Missouri statute is in no way violative of the Fourteenth Amendment's due process clause. Appellant was properly convicted in the court below.

Respectfully submitted,

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## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 317.

THE DAY-BRITE LIGHTING, INC.,
Appellant, /

VS.

STATE OF MISSOURI.

Appeal from the Supreme Court of the State of Missouri.

## MOTION TO TRANSFER CAUSE FROM SUMMARY DOCKET TO REGULAR DOCKET.

Comes now Day-Brite Lighting, Inc., appellant in the above-entitled cause, and respectfully moves this Honorable Court that the above-entitled cause be removed from the summary docket to the regular docket for argument, and for grounds for said motion appellant states and alleges as follows:

1. The case is of such a character that its adjudication is of widespread importance.

The constitutionality of the statute here under consideration is not merely of local interest in the State of Missouri. Some 16 states have practically similar statutes making it unlawful for an employer to deduct from an employee's wages during absence for voting purposes. The States are: Arizona, California, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, New York, Ohio, South Dakota, Texas, West Virginia and Wyoming. In addition, Colorado and Utah have similar statutes, except they do not apply to hourly paid employees. Six states authorize absence with no provision

for payment of wages. (See page 27, Statement as to jurisdiction.)

2. There is a conflict in state decisions on the constitutional questions involved here.

The Supreme Court of Illinois in People v. Chicago, Milwaukee & St. Paul Railway Co., 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610, held a practically identical statute unconstitutional, both under the State and Federal constitutions.

The Court of Appeals of Kentucky in the case of Illinois Central Railroad Co. v. the Commonwealth, 305 Ky. 632, 204 S. W. (2) 973, held a similar statute unconstitutional under both the Federal and State constitutions. (See pages 27, 28, Statement as to Jurisdiction.)

People v. The Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2) 697, decided by the appellate division of the Supreme Court of New York, held a similar statute constitutional. (See page 49, Statement as to Jurisdiction.)

Two California cases have upheld a similar California statute. The exact question here raised was not involved, but the principal was the same. These cases are Kouff v. Bethlehem-Alameda Shipyard, Inc., 202 Pac. (2) 1059, and Ballarini v. Schlage Lock Co., 226 Pac. (2) 771. (See page 49, Statement as to Jurisdiction.)

The same questions were raised in these cases and great confusion exists, particularly in those States whose statutes have not been tested as to whether a statute such as the one here involved, or similar to the one here involved, is indeed a violation of the Federal constitution. This situation should be clarified and every opportunity should be extended to both the appellant and the appellee in the instant case to present their arguments to the fullest extent.

3. The decision of the Missouri Supreme Court in the instant case enunciates an unprecedented extension of the police power.

The Missouri Supreme Court recognizes that the legis-

of due process under both the State and Federal constitutions, unless its enactment is within the police power of the state. (See last paragraph, page 26, Statement as to Jurisdiction.) In its decision the Missouri Supreme Court discusses police power at considerable length, and finally upholds the statute's constitutionality as being proper because the political welfare of the people is involved. "If the economic and physical welfare of the citizenry is within the police power of the State, then political welfare merits Its protection also." (See page 30, Statement as to Jurisdiction.). This foregoing excerpt from the opinion of the -Supreme Court of Missouri marks a departure from the recognized and established tests of the validity of police power and merits a careful and exhaustive analysis by this. Honorable Court. The fullest opportunity should be granted to both appellant and appellee to explore and clarify this issue.

In view of the foregoing, it is earnestly urged that this Honorable Court grant appellant's motion.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 317.

THE DAY-BRITE LIGHTING, INC.,
Appellant,

VS.

STATE OF MISSOURI.

Appeal from the Supreme Court of the State of Missouri.

APPELLANT'S PETITION FOR REHEARING.

WILLIAM H. ARMSTRONG

HENRY C. M. LAMKIN, Counsel for Appellant-

Petitioner.

- LOUIS J. PORTNER,
- COBBS, BLAKE, ARMSTRONG, TEASDALE & ROOS,
- Of Counsel.

St. Louis Law Paintine Co., 415 North Eighth Street. CEntral 4477

## SUPREME COURT OF THE UNITED STATES.

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THE DAY-BRITE LIGHTING, INC.,
Appellant,

VS.

STATE OF MISSOURI.

Appeal from the Supreme Court of the State of Missouri.

## APPELLANT'S PETITION FOR REHEARING.

Comes now The Day-Brite Lighting Inc., Appellant in the above entitled cause, and, in accordance with Rule 33 of the Revised Rules of the Supreme Court of the United States, respectfully prays this court that it be granted a rehearing in the above entitled cause. For grounds for such motion the Appellant states and alleges as follows:

T.

The majority opinion of this court overlooked material matters of fact and lay when it failed to justify an admitted taking of property without due process of law.

Said opinion implied the taking was under exercise of police power but failed to consider or discuss Appellant's position that such exercise was not reasonable under the circumstances in this case.

## OIL

The majority opinion of this court overlooked the test applied by this court in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, of considering, when deciding a case, "the economic conditions which have supervened and in the light of which the reasonableness of the exercise of the protective power of the State must be considered" when it stated: "We could strike down this law only if we returned to the philosophy of the Lochner, Coppage & Adkins cases."

#### III

The majority opinion of this court overlooked material matters of law when it disregarded the historic adjudications limiting the exercise of police power to reasonable restraints by law tending to promote the health, comfort, safety, morals, and economic and physical welfare of society. This statute exercises no reasonable restraint and promotes none of those things.

#### IV

The majority op nion of this court overlooked material matters of law and fact when it failed to discuss and justify the private maintenance of a public enterprise upheld by its decision.

#### V

The majority opinion of this court overlooked material matters of law and fact when it failed to discuss and jus-

tify the denial to appelled of the right to equal protection of the laws, in that the law contains no assurance that the employee paid for time on election day either votes or is entifled to vote. The avowed purpose of the law is not accomplished by the legislation.

#### VI

The majority opinion of this court overlooked material matters of law and fact when it failed to discuss and justify the denial to appellant of the right to equal protection of the laws by discriminatory legislation which artificially classifies voters into three group of voters; those voters who are employers and hence must pay employees for time off on election day; voters who are hourly paid employees and hence get paid for taking time off on election day; and voters who are neither employers or employees and hence neither pay or are paid. The majority opinion of the court does not show how under the Constitution of the United States there could ever be any classification of voters when as regards voting all voters are "similarly situated", and have an equal duty to share the burdens while equally reaping the benefits.

#### VII.

The majority opinion of this court misinterpreted material matters of law and fact when it states appellant's argument on abrogation of freedom of contract "presses" on this court the philosophy of the Lochner, Coppage and Adkins cases. Appellant did not seek to have this court determine whether the policy which this law "expresses offends the public welfare," but determine whether this legislation that admittedly deprives one of property without due process of law, that confessedly abrogates contracts and obviously arbitrarily classifies voters can be upheld because it safeguards the public welfare. It is not

a question of policy, but a yet unresolved question of the invasion of basic and fundamental rights.

#### VIII.

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The majority opinion of this court overlooked material matters of fact and law when it found the statute "contains in form a minimum wage requirement" and that this Court left "debatable issues as respects business, economic and social affairs to legislative decision." The Supreme Court of Missouri construed the statute as one to prevent corrupt practices in elections (240 S. W. 2d, l. c. 894, 5) and this court must accept the construction placed on it by the highest court in Missouri (see Guaranty Trust Co. of New York v. Blodgett, 53 S. Ct. 244, 287 U. S. 509, 77 L. Ed. 463, and cases cited). It is submitted legislation passed for that purpose can not be upheld as labor legislation.

#### IX.

The majority opinion of this court erred in material matters and of law and fact when it impliedly found Grotemeyer was penalized by not being paid when he performed no services for which pay was to be paid, and when it failed to discuss and consider appellants contention that the assessment of a fine against appellant under such circumstances constituted taking property without due process of law.

#### X.

The majority opinion of the court overlooked material matters of law and fact when it failed to consider and reconcile the fundamental distinction between legislation requiring payment of minimum wages for hours worked and legislation compelling payment of wages for time not worked at all.

#### XI.

The majority opinion of the court overlooked material matters of law and fact when it failed to consider, discuss or justify the Missouri legislature usurping a power not granted to it in Federal elections when that usurpation operated to deprive this appellant of property without due process of law. It further failed to consider, discuss or reconcile how this statute bore any relationship to the time, place or manner of holding Federal elections which is the limit placed on the state legislature's authority by the U. S. Constitution.

#### XII.

The majority opinion of this court exerlooked material matters of fact when it failed to distinguish between the granting of the right to have an opportunity to vote and the granting of the right to be paid for voting.

#### XIII.

The majority opinion of the court overlooked material matters of law and fact when it failed to consider, discuss and explain how the right to vote is synonymous with the right to be paid for being absent from work on election day.

#### XIV.

The majority opinion of this court erred in material matters of fact and law when it failed to/consider and explain why the costs of our civilization of which it speaks should not be equally borne by all of the recipients of the benefits of that civilization.

#### XX.

The majority opinion of this court failed to consider or explain why the upholding of this immoral legislation and the unrighteous compensation approved thereby is not a confession of failure of popular representation govern-

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Of Counsel.

City of St. Louis, State of Missouri.

#### Certificate of Good Faith.

This affiant, Henry C. M. Lamkin, attorney of record for the appellant, The Day-Brite Lighting Company, being duly sworn on oath, states that the foregoing Petition for Rehearing is not made for vexation or delay, but in good faith and all sincerity for the causes enumerated in said Petition.

/s/ Henry C. M. Lamkin.

Subscribed and sworn to before me a notary public within and for the City and State aforesaid on this 11th day of March, 1952.

/s/ Ruby G. Moxley,

Notary Public.

My commission expires: July 11, 1954.